TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 115.

MAX SELLIGER, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY, BY GEORGE H. ALEXANDER, REVENUE AGENT.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED JULY 1, 1907.

(20,773.)

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INDEX.

	Original.	Print.
Caption	1	1
Transcript from Jefferson circuit court	2	1
Caption	2	1
Transcript of judgment from county court	3	1
Supersedeas and return	6	2
Summons and return	7	3
Pleadings and orders filed in the county court	9	4
Statement and petition	9	4
Summons and return	15	6
Special demurrer of Max Selliger	17	7
Motion to require an election	18	7
Plea of not guilty	19	7
Special demurrer and motion overruled and order plea not guilty and postponed to November 7, 1904	19	8
Name of R. W. Bingham noted of record	20	8
Answer of defendants	21	8
Amended answer of Max Selliger	26	10
Demurrer to amended answer	31	12
Reply to amended answer	32	12
Agreed order controverting allegations of reply	38	14

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 29, 1908.

	Original.	Print.
Supplement to amended answer	39	15
Demurrer to supplement to amended answer	41	16
Opinion	42	16
Judgment of December 4, 1905	45	17
Motion and grounds for new trial	47	18
Transcript of evidence	49	18
Testimony of Max Selliger	49	18
Nathan M. Uri	73	27
W. H. Thomas	78	28
Agreement as to transcript of evidence	85	31
Order set at rules and order remand to rules	86	31
Assigned to January 30	86	31
Order submission	87	31
Order filing opinion	87	31
Opinion	87	31
Judgment of February 27, 1906	88	32
Motion to vacate and set aside judgment of February 27, 1906; motion overruled; exceptions	89	32
Amended judgment of March 6, 1906, order of appeal	90	32
Clerk's certificate	92	33
Statement	94	33
Submission	95	34
Judgment	95	34
Opinion	97	34
Submission of motion for rehearing, &c	107	37
Petition for rehearing	108	38
Order granting oral argument, &c	153	50
Order filing reply, &c	154	51
Reply to petition for rehearing	155	51
Order filing supplemental petition	200	66
Supplemental petition for rehearing	201	66
Order denying petition for rehearing	207	68
Order filing dissenting opinion	207	68
Dissenting opinion of Holson, J	208	69
Order filing agreement	212	70
Agreement as to extension of mandate	213	70
Extension and correction of mandate	216	71
Assignment of errors	219	71
Writ of error	223	73
Bond on writ of error	226	74
Citation and service	235	77
Clerk's certificate	236	77

1 THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

Pleas before the Honorable the Court of Appeals of Kentucky, at the Capitol, at Frankfort, on the 16th Day of January, 1907.

COMMONWEALTH OF KENTUCKY, by GEORGE H. ALEXANDER, Revenue Agent for the State at Large, Appellant,
vs.
MAX SELLIGER, Appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, 1st Division.

Be it remembered that on the 19th day of March 1906, the appellant by his attorney filed in the office of the Clerk of the Court of Appeals a transcript of the record, and which is in words and figures as follows:—

2 No. 41788.

STATE OF KENTUCKY, *County of Jefferson:*

Pleas before His Honor, Shackelford Miller, Judge of the Jefferson Circuit Court, Chancery Branch, First Division, at the Court House, in the City of Louisville, County and State aforenamed, and on dates hereinafter mentioned.

COMMONWEALTH OF KENTUCKY, ETC., Plaintiff,
vs.
MAX SELLIGER, ETC., Defendants.

Transcript of Record.

Be it remembered, That, heretofore, to-wit, on the 22nd day of December, 1905, the following transcript of judgment was
3 filed in the Clerk's office:

STATE OF KENTUCKY, *Jefferson County:*

December Term, County Court, December 4th, 1905.

112.

COMMONWEALTH OF KENTUCKY, by etc., Plaintiff,
vs.
MAX SELLIGER, ETC., ET AL., Defendant-.

This cause coming on to be heard in chief on the pleadings, exhibits and proof, it is adjudged by the Court that the defendant Max

Selliger, doing business under the trade name of Max Selliger & Company and the Belmont Distillery Company, omitted no personal property liable to assessment from assessment for taxation for the years 1900, 1901, 1902, 1903, 1904, & 1905 or either of them. That for each of said years the defendant, Max Selliger, listed all of his personal property of every class, character and form for assessment for taxation save and except the following:

4 For the year 1900.....7500 barrels of whiskey.
For the year 1901.....6030 barrels of whiskey.
For the year 1902.....4250 barrels of whiskey.
For the year 1903.....2566 barrels of whiskey.
For the year 1906.....1611 barrels of whiskey.
For the year 1905.....1564 barrels of whiskey.

That said whiskey above set forth was not subject to assessment for taxation for said years or either of them because same was an export within the meaning of Article 1 Section 10 sub-section 2 of the Federal Constitution and because said whiskey during all of said years was beyond the jurisdiction of limits of the State of Kentucky.

It is therefore adjudged that this action be dismissed to which judgment the plaintiff by counsel objects and excepts.

Whereupon came the plaintiff, by counsel, and filed its motion and grounds for a new trial herein, and the Court being ad-
5 vised, overrules said motion to which plaintiff objects and excepts and prays and directs an appeal to the Circuit Court, which is granted.

Clerk's costs $11.20
Sheriff's costs 1.85

I, W. J. Semonin, Clerk of the County Court of Jefferson County in the State of Kentucky, certify that the foregoing is a true copy of the judgment entered in the above styled action as the same appears of record in my office in Judgment Book 1, page 115.

In testimony whereof, I hereunto set my hand this 20th day of December, 1905.

W. J. SEMONIN,
Clerk Jefferson County Court, Ky.

6 Thereupon on the 22nd day of December, 1905, the Clerk issued supersedeas and copy, which said supersedeas is as follows, to-wit:

Jefferson Circuit Court.

To Honorable James P. Gregory, Judge Jefferson County Court, of Jefferson County, in the State of Kentucky:

You are hereby enjoined from all proceedings on a judgment rendered in favor of Max Selliger, doing business under the trade name of Max Selliger and Company and the Belmont Distillery Company No. 41788, against Commonwealth of Kentucky by etc., for dismissing its petition and $13.05 costs the said Commonwealth of Ken-

tucky by etc. having appealed to the Jefferson Circuit in my office as Clerk of said Court and you are hereby required to return the papers to said office.

Witness W. L. Weller, Jr., Clerk of said court, this 22nd day of December, 1905.

W. L. WELLER, JR., *Clerk,*
By R. KALTENBACHER, *D. C.*

7 The return on foregoing supersedeas is as follows, to-wit:
Came to hand December 23rd, 1905, at 9 A. M.
Executed January 4th, 1906, on James P. Gregory Judge Jefferson County Court by delivering a copy of the within supersedeas to Chas. A. Wilson, Judge of Jefferson County Court, successor to Honorable James P. Gregory.

CHAS. SCHUFF, *S. J. C.,*
By J. G. HIKES, *D. S.*

Thereupon on the 22nd day of December, 1905, the Clerk issued summons and two copies which said summons is as follows, to-wit:

The Commonwealth of Kentucky to the Sheriff of Jefferson County, Greeting:

8 We command you to summon Max Sellinger doing business under the trade name of Max Sellinger and Company and the Belmont Distillery Company, No. 41788, to appear before the judge of the Jefferson Circuit Court within twenty days from service hereof to answer an appeal taken to said court by Commonwealth of Kentucky, by etc., from a judgment rendered in favor of Max Sellinger and Belmont Distillery Company by Honorable James P. Gregory, Judge of Quarterly Court for said County for Dism. Peto. debt, and $13.05 costs.

Witness W. L. Weller, Jr., Clerk of said Court, this 22nd day of December, 1905.

W. L. WELLER, JR., *Clerk,*
By R. KALTENBACHER, *D. C.*

The return of the sheriff on the foregoing summons is as follows, to-wit:

Came to hand December 23rd, 1905, at 9 A. M.
Executed December 26th, 1905, on the Belmont Distillery Company, by delivering a copy of the within summons to Max
9 Sellinger, President of said Company, he being chief office found in this County at this time.

CHAS. SCHUFF, *S. J. C.,*
By D. J. HEFFERMAN, *D. S.*

Executed December 26th, 1905, on Max Sellinger by delivering to him a copy of the within summons.

CHAS. SCHUFF, *S. J. C.,*
By D. J. HEFFERMAN, *D. S.*

Thereupon on the 12th day of January, 1906, the following original papers were received from the Clerk of the Jefferson County Court and filed in the office of the Clerk of the Jefferson Circuit Court:

Filed in County Court August 24th, 1904.

Jefferson County Court.

COMMONWEALTH OF KENTUCKY, by GEO. H. ALEXANDER, Revenue Agent for the State at Large, Plaintiff,

vs.

MAX SELLINGER, BELMONT DISTILLERY COMPANY, Defendants.

Statement and Petition.

10 Plaintiff, Commonwealth of Kentucky by George H. Alexander, Revenue Agent for the State at large, states that the Belmont Distillery Company is and at all times mentioned herein was a corporation existing under the laws of the State of Kentucky with power to sue and be sued, contract and be contracted with and to hold property. Plaintiff states that the defendants Max Sellinger and the Belmont Distillery Co. were on September 15th, 1898, on September 15th, 1899, on September 15th, 1900, on September 15th, 1901, on September 15th, 1902, on September 15th, 1903, residents and citizens of Jefferson County, Kentucky.

Plaintiff states that the defendants aforesaid on September 15th, 1898, on September 15th, 1899, on September 15th, 1900, on September 15th, 1901, on September 15th, 1902, on September 15th, 1903, were the owners of and in possession of personal estate consisting of bonds, notes, mortgages, stocks, choses in action, securities of various kinds, cash on hand and on deposit and claims held against various persons and corporations of a fair cash value estimated at the price said property would bring at a voluntary

11 sale of $250,000.00, all of which was subject to taxation for State and County purposes, and no part of which was assessed by the City Assessor or any other officer at or of the dates aforesaid or for the years named or any of them. Plaintiff states that the assessment of said property at and of the dates and for the years above mentioned was omitted and said defendant failed and refused to list said property or any part thereof with the Assessor or any other officer, or to file with said Assessor or officer a schedule enumerating said property or any part thereof, or in any way return the same for assessment and taxation for the years above mentioned or any of them.

Plaintiff states that the rates of taxation levied by the Legislature and imposed upon all the property in the Commonwealth was and is as follows:

For the year 1899 on assessments made as of September 15th, 1898, 52½ cents on each $100.00.

12 For the year 1900 on assessments made as of September 15th, 1899, 47½ cents on each $100.00.

For the year 1901 on assessments made as of September 15th, 1900, 47½ cents on each $100.00.

For the year 1902 on assessments made as of September 15th, 1901, 50 cents on each $100.00.

For the year 1903, on assessments made as of September 15th, 1902, 50 cents on each $100.00.

For the year 1904, on assessments made as of September 15th, 1903, 50 cents on each *50 cents on each* $100.00.

Plaintiff states that the County of Jefferson by its Fiscal Court levied upon all of the property in the said County of the character and time as that owned by the defendant aforesaid the following rate of taxation:

For the year 1899 on assessments made as of September 15th, 1898, 17 cents on each $100.00.

For the year 1900, on assessments made as of September 15th, 1899, 15 cents on each $100.00.

13 For the year 1901 on assessments made as of September 15th, 1900, 29 cents on each $100.00.

For the year 1902 on assessments made as of September 15th, 1901, 22 cents on each $100.00.

For the year 1903, on assessments made as of September 15th, 1902, 24 cents on each $100.00.

For the year 1904, on assessments made as of September 15th, 1903, 28 cents on each $100.00.

Plaintiff states that all of the property of the defendant as herein mentioned of the value as stated of $250,000.00 was subject to State and County taxes for the years hereinbefore mentioned and at the rate set forth herein, and that the plaintiff was now entitled to recover and receive of the defendants said State and County taxes on the property aforesaid.

Wherefore plaintiff prays judgment against the defendants — assessing the personal estate owned and held by them at the

14 times and of the value herein set forth, and that plaintiff have judgment against said defendants for the amount of taxes due the Commonwealth of Kentucky and the County of Jefferson on said property as well as twenty per cent. penalty on the amount of taxes due the said County and State as follows:

State Tax for the year 1899	$1312.50
State tax for the year 1900	1187.50
State tax for the year 1901	1187.50
State tax for the year 1902	1250.00
State tax for the year 1903	1250.00
State tax for the year 1904	1250.00
Total state taxes	$7437.50

County taxes for 1899	$425.00
County taxes for 1900	375.00
County taxes for 1901	725.00
County taxes for 1902	550.00
County taxes for 1903	600.00
County taxes for 1904	700.00
	$3375.00

15	Total State and County Taxes	$10812.50
	20% penalty on amount aforesaid	2162.50

Plaintiff prays for its costs herein expended and for all other relief general, equitable and special.

COMMONWEALTH OF KENTUCKY,
By GEORGE H. ALEXANDER,
Revenue Agent for the State at Large.

Thereupon on the 24th day of August, 1904, the Clerk of the Jefferson County Court issued the following summons:

COMMONWEALTH OF KENTUCKY, *Jefferson County Court:*

To the Sheriff of Jefferson County or any Constable, Greeting:

You are hereby commanded to summon Max Selliger and Belmont Distillery Co. to appear before the Jefferson County Court on the first day of its next October Term (October 3rd, 1904)
16 and answer a statement filed against them by the Commonwealth of Kentucky, by Geo. H. Alexander, Revenue Agent for the State at Large, and show cause why they should not be assessed for the years 1899, 1900, 1901, 1902, 1903, and 1904, of certain personal property as fully set up and described in the statement filed, and warn them upon their failure to answer said statement, the allegations of the same will be taken for confessed as true against them, and judgment will be rendered thereon according to law.

Given under my hand as Clerk of said County Court this 24th day of August, 1904.

W. J. SEMONIN,
Clerk, Jefferson County Court, Kentucky.
By JOS. J. SCHENE, *D. C.*

The return on the foregoing summons is as follows, to wit:
Came to hand Aug. 25th, 1904, at 1:45 P. M.
Executed September 13th, 1904, on Max Selliger by delivering to him a copy of the within summons.

17 E. T. SCHMITT, *S. J. C.*,
By W. B. THIXTON, *D. S.*

Filed in County Court October 3rd, 1904.

Jefferson County Court.

COMMONWEALTH OF KY., by, etc., Plaintiff,
vs.
MAX SELLIGER and BELMONT DISTILLERY CO., *Defts.*, Defendants.

Special Demurrer of Max Selliger.

The defendant Max Selliger specially demurs to the plaintiff's statement and petition herein because there is a manifest misjoinder and defect of parties defendant.

Wherefore, etc.

DODD AND DODD,
Att'ys for Selliger.

18 Filed in County Court October 3rd, 1904.

Jefferson County Court.

COMMONWEALTH OF KENTUCKY, by, etc., Plaintiff,
vs.
MAX SELLIGER and BELMONT DISTILLERY CO., Defendants.

Motion to Require an Election.

The defendant, Belmont Distillery Company moves the Court to require the plaintiff to elect against which one of the two defendants improperly joined herein and as to which of its two alleged improperly joined causes of action it will prosecute this proceeding.

DODD AND DODD,
Attorneys for Belmont Distillery Company.

Filed in County Court October 11th, 1904.

Jefferson County Court.

19 COMMONWEALTH OF KENTUCKY, by, etc., Plaintiff,
versus
MAX SELLIGER and BELMONT DISTILLERY CO. Defendants.

Plea of Not Guilty.

The defendant, Belmont Distillery Company, for answer to the petition pleads not guilty of any of the matters and things complained of against it herein.

Wherefore etc.

DODD AND DODD,
Att'ys for Belmont Distillery Co.

Entered in County Court on October 11th, 1904.

Jefferson County Court.

COMMONWEALTH OF KENTUCKY, by, etc., Plaintiff,
vs.
MAX SELLIGER, ETC., Defendants.

Order.

Tis action having been heard and submitted on the special
20 demurrer of Max Selliger and motion of the defendant Belmont Distillery Company, it is ordered that the special demurrer and motion be overruled:

And thereupon came the defendants and severally entered a plea of not guilty, and this action is postponed until November 7th, 1904, for further proceedings herein.

Entered in County Court on November 4th, 1904.

Jefferson County Court.

COMMONWEALTH OF KENTUCKY, by GEORGE H. ALEXANDER, Revenue Agent for the State at Large, Plaintiff,
vs.
MAX SELLIGER, ETC., Defendants.

It is ordered that the motion of R. W. Bingham, County Attorney, to have his name noted of record herein as attorney for plaintiff, be and the same is hereby sustained.

JAMES P. GREGORY, *Judge.*

21 Filed in the County Court April 3rd, 1905.

Jefferson County Court.

COMMONWEALTH OF KENTUCKY, by GEORGE H. ALEXANDER, Revenue Agent, Plaintiff,
vs.
MAX SELLIGER and BELMONT DISTILLERY CO., Defendants.

Answer of Defendants.

The defendants in the above styled cause, for joint and several answer to the petition herein, deny that on September 15th, 1898, or on September 15th, 1899, or on September 15th, 1900, or on September 15th, 1901, or on September 15th, 1902, or on September 15th, 1903, these defendants, or either of them, were the owners of or in the possession of personal estate omitted from assessment consisting of bonds, or notes, or mortgages, or stocks, or choses in action,

or securities of any kind, or cash on hand or on deposit in Bank, or claims held against various or any persons or corporations,
22 subject to taxation for State and County purposes, or either of them, of the fair cash value, estimated at the price such property would bring at a voluntary sale, of $250,000.00, or of any part thereof which was omitted from assessment, or not listed, or upon which the State and County taxes have not heretofore assessed and paid.

They deny that any of his or its personal property subject to such taxation was omitted from assessment for any of the said years. They deny that no part of their, or either of their said personal property was assessed by the City Assessor or other officer at or of the dates it became properly assessable for the said years, and each of them. They deny that the assessment of any part of their, or either of their personal property subject to taxation was omitted for any of the said years. They deny that they, or either of them, ever failed or refused to list any part of their, or either of their personal estates with the Assessor or other officer designated by law to whom such list or assessment should be made. They deny that they, or
23 either of them, ever failed or refused to file with the proper officer a schedule enumerating their or either of their taxable property. They deny that they or either of them ever failed or refused to return any part of their personal property for assessment and taxation for the said years herein involved or for any of them. They deny that they or either of them have ever been delinquent in any way either in failing to list or return any of their assessable property. They deny that they or either of them are liable for any part of the additional assessments or taxes sought to be charged against them in the petition herein. They deny that they or either of them have not heretofore already paid all of the State and County taxes properly assessable and justly due by them to the plaintiff and the County of Jefferson. They deny that they or either of them owe any part of the County taxes sued for aggregating $3375.00. They deny that they or either are liable or subject to any penalty amounting to the sum of $2,162.50, or any part thereof.

24 Paragraph 2. For further answer these defendants state that within the time and in the manner required by law they and each of them have listed returned and scheduled all their taxable property in manner and form as required by law, and the same has been assessed, and they have fully paid and satisfied the taxes assessed against the same when and as due and payable in the time and in the manner and form as required by law and have in all respects complied with the Revenue Laws applicable to their taxable property during the said years and each of them.

Paragraph 3. And for further answer these defendants state that the plaintiff is by law limited and restricted to retrospective assessments to five years from the 15th day of each and every September during which the assessments accrued and were required to be made.

That as to the year 1898, herein complained of, more than
25 five years had elapsed since the institution of this proceeding; that while they honestly believe that they have never been delinquent or failed in any respect to list and determine their assess-

able property in the manner and form as required by law, nevertheless they do now further plead the Statute of Limitation in such cases made and provided and say that in no event is it now permissible for the plaintiff to inquire back further than five years prior to the filing of this suit touching the matter set forth in its petition, and they plead the said Statute of Limitations in such cases made and provided in bar of plaintiff's claim to the extent that the same seeks to go back further than said five years.

Wherefore, these defendants pray that the plaintiff's petition be dismissed and for all proper relief.

DODD AND DODD,
Attorneys for Defendants.

Filed in County Court April 12th, 1905.

26 Jefferson County Court.

COMMONWEALTH OF KENTUCKY, by GEORGE H. ALEXANDER, Revenue Agent, Plaintiff,
vs.
MAX SELLIGER, ETC., Defendants.

Amended Answer of Max Selliger Carrying on Business as Max Selliger and Company.

The defendant, Max Selliger, carrying on business under the trade name of Max Selliger and Company, by leave of Court amends his answer heretofore filed herein and says that heretofore, to-wit: in and about the year 1893, in compliance with the laws of the United States he duly and regularly exported to Bremen and Hamburg in the Empire of Germany for sale abroad a large amount of bonded whiskey of which he was the owner subject to the Governmental Internal Revenue Tax thereon; that he fully complied with all the laws applicable to exporting such articles of commerce whereupon the United States Government consented thereto and renounced its custody and jurisdiction over the said whiskey including its
27 Internal Revenue charges against the same and agreed that the situs of such exported article for taxation purposes should thenceforth be in and with the Empire of Germany so long as the same remained therein and beyond the territorial boundary of the United States.

Defendant says that in the tenth section of the first article of the Constitution of the United States, it is provided that "No state shall without the consent of the Congress lay any imposts or duties on imports or *exports* except what may be absolutely necessary for executing its inspection laws", and hence the said exported whiskey has not been and is not taxable under any law of the State of Kentucky so long and while its situs as an export is and remains beyond the territorial jurisdiction of the United States of America because the Congress has never given its consent to any such tax. Whenever the same or any part thereof may be brought back to the United

States of America an import duty at the rate of $1.10 per
28 proof gallon thereof is forthwith levied and imposed in behalf of the United States and the same is seized and kept in its custody in its bonded warehouses at the expense and risk of the owners until such duty is paid.

Defendant says that ever since his exportation of the said whiskey he has not listed or reported any part thereof whose situs continues in Germany as a part of his Kentucky taxable property because he was advised and believed and still insists that it is not legally taxable in Kentucky until when and after and to the extent the same may be brought back to the United States. While such whiskies remain in Germany they are taxed by that Government.

Defendant says that if such exports are taxable in Kentucky, notwithstanding their foreign export situs and taxation where located, then the basis of such taxation as of September 15th, of the years 1899, 1900, 1901, 1903 and September 1st, 1904, should be upon the following number of barrels so exported and located towit:

29	September 15th, 1899	70005 barrels
	September 15th, 1900	6030 barrels
September 15th, 1901		4250 barrels
September 15th, 1902		2566 barrels
September 15th, 1903		1611 barrels
September 1st, 1904		1564 barrels

Defendant says that the aforesaid whiskies were made in Kentucky during the years 1889, 1890, 1891; that there was a very large overproduction of such whiskey during the said years; that about the date of his aforesaid exportation other distillers and owners in like manner exported large quantities of similar whiskies to Germany aggregating in all over 250,000 barrels; that all of the said whiskies were received and stored in the original packages and so continued by the German Government in its own warehouses at the expense and risk of the exporters and a charge of impost of 6 cents per barrel per month taxed against the same while in such Government warehouses and a very much larger tax by said
30 German Government is imposed when and as they are withdrawn from such Government warehouses for distribution and consumption in said German Empire, to-wit: at the rate of $2.40 per gallon.

Defendant claims that the plaintiff is prohibited by the Federal Constitution and laws from imposing and collecting any tax on said exported articles of commerce so long as the situs thereof is beyond the jurisdiction of the United States and of Kentucky.

Wherefore, he prays the judgment of the Court as to whether such exports are taxable in this proceeding and for all proper relief.

DODD AND DODD,
Attorneys for Defendants.

Max Selliger says the statements of the foregoing answer are true as he verily believes.

MAX SELLIGER.

Subscribed and sworn to before me by Max Selliger this
31 the — day of April, 1905.

ELEANOR SHORT,
N. P., J. C., Ky.

Filed in County Court April 12th, 1905.

Jefferson County Court.

COMMONWEALTH OF KENTUCKY, ETC., Plaintiff,
vs.
MAX SELLIGER, ETC., Defendants.

Demurrer.

The plaintiff, Commonwealth of Kentucky, etc., demurs to the amended answer of the defendant-, Max Selliger, etc., because said amended answer does not state facts constituting a defense to plaintiff's statement or petition nor assign a good and sufficient reason or cause why the property described and set forth in said amended answer should not be assessed as omitted property.

COMMONWEALTH OF KENTUCKY,
By GEO. H. ALEXANDER,
Revenue Agent for State at Large.

M. J. HOLT,
Of Counsel.

32 Filed in County Clerk's Court June 2nd, 1905.

Jefferson County Court.

COMMONWEALTH OF KENTUCKY, by GEO. H. ALEXANDER, Revenue Agent for State at Large, Plaintiff,
vs.
MAX SELLIGER, Defendant.

Reply to Amended Answer of Max Selliger, etc.

The plaintiff, Commonwealth of Kentucky by George H. Alexander, Revenue Agent for the State at large for reply to the answer of defendant Max Selliger carrying on business under the trade name of Max Selliger and Company, admits: that in 1893 that the defendant exported to Bremen and Hamburg in the Empire of German- a large amount of whiskey of which he was and yet remains the owner but denies that the same was exported for sale abroad or was consigned to any purchaser at said place of destination. Plaintiff denies that the situs of said exported whiskey for taxation was in the empire of Germany and remained so so long as it was beyond the territorial boundary of the United States save

and except an internal revenue or warehouse tax. Denies
33 that the U. S. Government consented to a release on said whiskey for taxation purposes save and except the revenue tax imposed by the U. S. Denies that under the Tenth Section of the First Article of the Constitution of the United States said exported whiskey has not been and is not taxable for State and County purposes under any law of the State of Kentucky while said whiskey was beyond the territorial jurisdiction of the United States of America to-wit: in Bremen and Hamburg, Germany.

Plaintiff states that the defendant during all the time from and before September 15th, 1899, to and including September 1st, 1904, was a citizen of Louisville, Jefferson County and there engaged in the wholesale whiskey business. That the situs of said whiskey (set forth in his amended answer and hereafter set forth in his reply) for the purposes of taxation (*i. e.* an ad valorem tax) was and is in Jefferson County Kentucky and that said whiskey while in Bremen and Hamburg was and is subject to taxation and should have been assessed by the defendant for each of the years set forth
34 in the original statement filed by plaintiff herein. Plaintiff states that when the said defendant exported said whiskey beyond the territorial jurisdiction of the United States that same was not consigned to any purchaser but the ownership of same remained in the said defendant and that there was no sale of said whiskey at the time of the said exportation. That said whiskey was not exported as is contemplated under and by Section 10 Art. 1 of the Federal Constitution but merely shipped by the defendant to Germany as a speculation and to evade certain charges taxes and expenses; that same was done for the purpose of evading revenue and ad valorem taxes thereon. That same was not exported goods within the meaning of said Section as an export within the meaning of said section as a commodity carried from one place or country to another for sale and that same was not exported for such purpose. That to export within the meaning of said Section is to send for sale or exchange to a foreign country and does not contemplate a change of situs without a change of ownership, and although
35 said whiskey was placed in said German Warehouses in 1893, the defendant retained and still retains the ownership and title in same.

The said defendant during all the time since before September 14th, 1899, until this date was the owner of and in possession of said whiskey so exported save and except such portion of same as he reshipped to himself and returned to Louisville, Kentucky, or sold to other purchasers from time to time in the State of Kentucky and in the United States.

Plaintiff states that all of the whiskey exported by the defendant about 1893 amounted to nearly 15,000 barrels has been re-exported by him and sold by him to purchasers in the United States, save and except about 1600 barrels which said defendant still had and owned in the Empire of Germany on September 1st, 1904. Plaintiff states that said defendant at no time during said year parted with the ownership and title to any of said whiskey save and except such

portion as he re-exported to himself or purchasers of same from him in the United States. Plaintiff states that at all times during
36 said years while said whiskey remained in the warehouses of the German Government that said defendant held the warehouse receipts for same and used same as collateral in making loans and traded in said warehouse receipts.

Plaintiff admits that said whiskey was made during the years 1889, 1890 and 1891 and states that said whiskey is worth the sum of $25.00 per barrel over and above the revenue tax and warehouse charges thereon. Plaintiff states that on September 15th, 1899, the defendant was the owner of 15,000 barrels of said whiskey in warehouses in the Empire of Germany and on September 15th, 1900, he was the owner of 12,000 barrels in said warehouses and on September 15th, 1901 he was the owner of 10,000 barrels in said warehouses and on September 15th, 1902, he was the owner of 6,000 barrels in said warehouses that on September 15th, 1903, he was the owner of 3,000 barrels in said warehouses, that on September 1st, 1904, he was the owner of 1600 barrels in said warehouses and that
37 on each of said dates defendant was a resident of Louisville, Jefferson County, Kentucky, and engaged in the wholesale whiskey business at said place and the situs of said whiskey for the purpose of ad valorem taxation was at his place of residence. Plaintiff states that the barrels of whiskey disposed of by him between the 15th day of September, 1899, and the first day of September, 1904, were all returned to the United States and most of same to the State of Kentucky; that during all of said time the defendant held warehouse receipts for same and was the owner of all of said whiskey.

Wherefore plaintiff prays as in its original statement.

COMMONWEALTH OF KENTUCKY,
By GEORGE H. ALEXANDER,
Revenue Agent for State at Large.

M. J. HOLT,
Of Counsel.

Filed in the County Court June 30th, 1905.

38 Jefferson County Court.

COMMONWEALTH OF KENTUCKY, by GEORGE H. ALEXANDER, Revenue Agt., Plaintiff,
vs.
MAX SELLIGER, ETC., Defendants.

Agreed Order Controverting Affirmative Allegations of Reply.

It is now and hereby agreed that the affirmative allegations of the plaintiff's reply, filed herein June 5th, 1905, so far as they, or any of them are inconsistent with the answer as amended, shall be treated and considered as specifically controverted of record without further pleading, and with the same force and effect as if specifically denied

in a rejoinder, that proof may be taken after notice by depositions and that this cause be assigned for trial to the 6th day of October, 1905.

M. J. HOLT,
Of Att'ys for Plaintiff.
DODD AND DODD,
Att'ys for Defendants.

39 Filed in County Court on October 11th, 1905.

Jefferson County Court.

COMMONWEALTH OF KENTUCKY, by GEO. H. ALEXANDER, Revenue Agent, Plaintiff,
vs.
MAX SELLIGER, ETC., Defendants.

Supplement to Amended Answer.

The defendant by leave of Court now supplements and amends his answer herein, and says that about the year 1893 the whiskey described in his previous amended answer was exported and transported from the State of Kentucky to the Empire of Germany for the purposes of sale abroad, and with no intention that any part thereof should ever thereafter be returned to the State of Kentucky; that it was then, and such of it as remained and belonged to him at the times set forth in plaintiff's petition continued to be tangible property whose situs thereafter has continuously been in the
40 Empire of Germany and beyond the territorial limits and jurisdiction of the taxing authorities of the State of Kentucky, and that assessments and taxation against the same, or any part thereof, by the State of Kentucky, or by any of its subordinate geographical subdivisions while thus exported and located in Germany, would deprive this defendant of his property to the extent of such taxes without due process of law and the general protection of the laws which is forbidden by the provisions of the Constitution of the United States and unlawful, especially under the 14th amendment thereof. Wherefore, in addition to the matters heretofore pleaded and relied upon, this defendant now pleads and relies upon the protection given him by the Federal Constitution, as aforesaid.

Wherefore, he prays as heretofore and for all proper relief.

DODD AND DODD,
Attorneys for Defendant.

41 The statements contained in the foregoing pleading are true as he verily believes.

MAX SELLIGER.

Subscribed and sworn to before me by Max Selliger this the 6th day of October, 1905. My commission expires January 12th, 1908.

DAVID BAIRD,
N. P., J. C., Ky.

Filed in County Court October 11th, 1905.

Jefferson County Court.

COMMONWEALTH OF KENTUCKY, by, etc., Plaintiff,
vs.
MAX SELLIGER, ETC., Defendants.

Demurrer.

Now comes the plaintiff and demurs to the "supplement
42 to amended answer" because same does not state facts sufficient to constitute a defense of law or fact to plaintiff's statement.

COMMONWEALTH, ETC.,
By GEO. H. ALEXANDER, ETC.

M. J. HOLT, *Att'y.*

Filed in the County Court November 28th, 1905.

Jefferson County Court.

COMMONWEALTH OF KENTUCKY, by, etc., Plaintiff,
vs.
MAX SELLIGER, ETC., Defendants.

Opinion.

After a careful consideration of this case in chief the Court is unable to find any reason for changing the views expressed
43 in opinion upon demurrer to amended answer, and is of opinion that the present condition of the record does not materially change the question then presented.

Insofar as questions of fact are concerned it seems to be perfectly clear that this whiskey remained in the original packages and that breaking the lock and selling certain barrels was in no sense a breaking of the original packages and in no way commingling the remaining barrels so as to cause them to lose their "distinctive characteristic," within the meaning of Brown *vs.* Maryland, 12 Wheat. 419 and similar cases.

The Court is further of opinion under the facts proven in this case that the whiskey in question comes clearly within the exemption prescribed by the Federal Constitution and Statute with reference to exports and imports.

Since the rendition of the former opinion and since this submission an additional and almost imperative reason for holding this property exempt from the taxes herein claimed is furnished
44 by the decision of the Supreme Court of the United States in the Union Refrigerator Transit case emphatically denying to any Commonwealth the power to tax tangible property located

beyond its territory and having a situs in another State or Country. The warehouse receipts held and hypothecated by defendant here were in no sense property and were not taxable nor did they in any way alter or change the situs of the property evidenced by them. The property sought to be reached was tangible and in the opinion of the Court comes clearly within the rule prescribed by the Supreme Court of the United States in the Union Refrigerator case but not actually beyond the territorial limits of Kentucky, this property was exempt from taxation under the federal laws for reasons heretofore assigned.

Judgment must go for defendant.

JAMES P. GREGORY, *Judge.*

November 28th, 1905.

45 Entered in County Court December 4th, 1905.

Jefferson County Court.

COMMONWEALTH OF KENTUCKY, by, etc., Plaintiff,
vs.
MAX SELLIGER ET AL. Defendants.

Judgment.

This cause coming on to be heard in chief upon the pleadings, exhibits and proof it is adjudged by the Court that the defendants Max Selliger doing business under the trade name of Max Selliger and Company, and the Belmont Distillery Company omitted no personal property liable to assessment from assessment for taxation for the years 1890, 1901, 1902, 1903, 1904, and 1905 or either of them. That for such of said years the defendant, Max Selliger, listed all of his personal property of every class, character and form for assessment for taxation save and except the following:

46 For the year 1900.....7005 barrels of whiskey
For the year 1901.....6030 barrels of whiskey
For the year 1902.....4250 barrels of whiskey
For the year 1903.....2566 barrels of whiskey
For the year 1904.....1611 barrels of whiskey
For the year 1905.....1564 barrels of whiskey

The said whiskey above set forth was not subject to assessment for taxation for said years or either of them because same was an export within the meaning of Art. 1 Sec. 10 sub. sec. 2 of the Federal Constitution and because said whiskey during all said years was beyond the jurisdictional limits of the State of Kentucky.

It is therefore adjudged that this action be dismissed to which judgment the plaintiff by counsel objects and excepts.

Whereupon came the plaintiff by counsel and filed its motion and

grounds for a new trial herein, and the Court being advised
47 overrules said motion to which the plaintiff objects and excepts and directs an appeal to the Circuit Court which is granted.

JAMES P. GREGORY, *Judge.*

Dec. 4th, 1905.

Filed in County Court December 4th, 1905.

Jefferson County Court.

COMMONWEALTH OF KENTUCKY, by, etc., Plaintiff,
vs.
MAX SELLIGER, ETC., Defendants.

Motion and Grounds for New Trial.

Now comes the plaintiff herein and files and makes this its motion for a new trial herein and as grounds therefor assigns the following:

1. Errors of law occurring at the trial and excepted to
48 by the plaintiff.

a. In overruling plaintiff's demurrer to the defendants' answer.

b. In not assessing the defendant with the whiskey which he admitted he omitted listing from assessment in his answer.

c. In finding and deciding that the whiskey which defendant omitted to list for assessment was not subject to taxation because same was an export and beyond the jurisdictional limits of Kentucky when the residence of defendant was Louisville, he was the owner of same, held the warehouse receipts for same, sold same by warehouse receipts, and hypothecated the warehouse receipts at $10.00 per barrel.

COMMONWEALTH, ETC.,
By M. J. HOLT, *Attorney.*

49 In the Jefferson County Court.

COMMONWEALTH OF KENTUCKY, by, &c., Plaintiff,
vs.
MAX SELLIGER &C., Defendants.

This case coming on to be heard before the Hon. James P. Gregory, Judge of the Jefferson County Court, on the 31st day of October, 1905, the following evidence was introduced:

MAX SELLIGER, called in behalf of the plaintiff, being duly sworn, and examined by Mr. Holt, testified as follows:

1. Where do you live, Mr. Selliger?
A. In Louisville.
2. How long have you resided in Louisville?
A. Fifty years.
3. This has been your home to the exclusion of anywhere else,

or was, during the years 1899 to 1905, inclusive, is that
50 correct?

A. Yes, sir.

4. You did business, did you not Mr. Selliger, under the trade name of Max Selliger & Company?

A. When?

5. During those years?

A. No, sir.

6. During the years 1899, 1900, 1901, 1902, 1903 and 1904 how did you do business?

A. Max Selliger & Company.

7. During the year 1893, what was the name under which you, or you as a member of any firm or corporation, did business?

A. Moore & Selliger.

8. How long did you do business under the name of Moore & Selliger?

A. About eighteen years.

9. About the year 1893, under what name were you doing business?

51 A. Moore & Selliger.

10. And up to what time thereafter?

A. Mr. Moore died in 1896, and Max Selliger commenced business in May, 1897.

11. When *were you* doing business under the firm name of Moore & Selliger, did that firm export any whiskey to Bremen and Hamburg, Germany, or to any point outside of the State of Kentucky?

A. Yes, sir.

12. How much whiskey was exported by that firm?

A. I don't recollect the exact figures, but somewhere in the neighborhood of eighteen thousand barrels.

13. How long did that whiskey remain outside of the limits of the State of Kentucky?

A. Well, the whiskey we made in 1899 got the three year bonded period, and in 1890 and 1891, so it went out there in 1893, 1894 and 1895—1892, 1893 and 1894.

14. When was that whiskey brought back to the State of Kentucky?

52 A. It was brought back in various intervals, some of it was.

15. How much whiskey had the firm of Moore & Selliger at the time of the death of Mr. Moore, if you know, outside of the State of Kentucky?

A. I don't recollect the figures, somewhere in the neighborhood, I think, of fourteen or fifteen thousand barrels.

It is agreed between counsel that it was sixteen thousand barrels in Bremen and Hamburg.

16. You closed up the affairs of Moore & Selliger as the surviving partner, did you not?

A. Yes, sir.

17. And you bought or disposed of his interest in this whiskey that was exported?

A. No, sir.

18. What became of his interest in this whiskey that was exported to Bremen and Hamburg?

53 A. I expect you will have to ask the Fidelity about that.

19. Didn't you buy it from them?

A. No, sir.

20. On the 15th day of September, 1899, how many barrels of whiskey had you in Germany?

A. Seven thousand and five.

21. How many barrels at the same place on the 15th of September, 1900?

A. Six thousand and thirty.

22. How many on the 15th day of September, 1901?

A. Four thousand two hundred and fifty.

23. How many barrels on September 15th, 1902?

A. Twenty-five hundred and sixty-six.

24. How many on September 15th, 1903?

A. Sixteen hundred and eleven.

25. How many on September 1st, 1904?

A. Fifteen hundred and sixty-four.

26. When that was exported, by whom was that, with the

54 other whiskey, exported?

A. It was exported by Moore & Selliger, all of it.

27. This particular whiskey on these dates was your individual whiskey, was it not?

A. Yes, sir; not at the time we exported it, it was not.

28. To whom was that whiskey exported; who was the consignee?

A. It was exported to Hamburg, and part of it to Bremen.

29. Well, who was the consignee of the whiskey?

A. I don't know his initials, but in Hamburg it was Mr. Gunther, I don't recall his initials now,—Anton Gunther.

30. And who was at the other point?

A. Emil Ipsen.

31. Were they purchasers of this whiskey?

A. No, sir.

32. Well, in what capacity did they act as the assignee of this whiskey?

A. As custodians and warehousemen, and salesmen if they

55 could sell it.

33. Were they the warehousemen at those points, Hamburg and Bremen?

A. Yes, sir.

34. When was this particular whiskey that you owned on September 15th, 1899, this seven thousand and five barrels, exported?

A. Well, I don't know what age that particular lot of whiskey is, but there are three ages there, exported in three different years?

35. Well, what are those years?

A. 1892, 1893, and 1894. I don't know what part of the seven thousand barrels comes in those three years.

36. Did this particular portion that you have testified that you had on those respective dates, remain in those two warehouses during the entire perior?

A. I cannot answer that, because I don't know whether all that whiskey you have reference to is in one warehouse, all we had in Hamburg is out of there; what we have in Bremen I don't
56 know what that amounts to.

37. I mean, in those two places?

A. Yes, sir.

38. You say that this whiskey that you speak of here for these five years, was shipped to these people as warehousemen, consigned to them, and for the purpose of sale if they had an opportunity to sell it; is that correct?

A. Yes, sir; or if we could sell them ourselves.

39. Well, you say you originally exported about sixteen thousand barrels during the three years?

A. Yes, sir.

40. What became of the balance of this whiskey other than the amount that is set forth here; was that sold along during the time?

A. One-half of it was divided at the time of Mr. George Moore's death to the Fidelity Trust Company, I don't know what became of that. We sold some of the others, some of our own holdings.

41. Did you sell any of that whiskey in Germany?
57 A. Yes, sir.

42. Do you know just how much was sold in Germany?

A. No, I do not.

43. How much of it was brought back to the United States and sold during these different years?

A. Well, I can't tell.

44. Quite a considerable amount, wasn't there?

A. We brought back considerable ourselves and sold it; we sold a great deal of it over there; I don't know what the people did with it.

45. The majority of the whiskey that you brought back to this country was sold in the State of Kentucky, was it not?

A. Sold from the State of Kentucky,—yes, sir.

46. Well, wasn't it sold to people in the State of Kentucky?

A. Very little of it.

47. You can't give an estimate as to how much was sold to people in the State of Kentucky?

A. I don't recollect but one or two sales made here in Louisville.

58 48. How long have you been in the wholesale whiskey business, Mr. Selliger, that is, as Moore & Selliger and Max Selliger & Company?

A. About twenty-six years.

49. What particular brand or grade of whiskey were these barrels of whiskey that you had on hand on September 15th, 1899 up to September 1st, 1904, that are set forth in your answer here?

A. Sour mash whiskey.

50. Well, how old was it?

A. Well, they were made in 1889, 1890 and 1891.

51. How long had this whiskey been in bonded warehouses in this State prior to its exportation?

A. Three years.

52. In the case of all this whiskey, you let it all remain practically the full time that you could under law, did you not?

A. The bonded perior.

53. The bonded perior at that time was three years, was it not?

59 A. Yes, sir.

54. During those years of 1891, 1892, and 1893, there was an immense over-production of whiskey, was there not?

A. I think there was.

55. And wasn't that one of the prime reasons for exporting this whiskey at that time?

A. Yes, sir; we thought it more profitable to send it over there than tax pay it here.

56. You could not have sold that whiskey to realize anywhere near its cost of manufacture here at that time, could you?

A. I think we could.

57. Could you have sold that whiskey at that time at a profit?

A. Well, I think we could—yes, sir.

58. What was the price of whiskey during the years, 1892 and 1893, this grade of whiskey, in the State of Kentucky, wholesale?

60 A. I can't recollect that.

59. You do not?

A. No.

60. Well, your purpose for shipping it over was to evade paying the ninety cents on the gallon, wasn't it?

A. No, sir.

61. What was the purpose in shipping this over?

A. If we could have raised the money to pay the tax on it, it would have been more profitable, we sent it over there and stored it in Europe, we thought we could sell it to better advantage later on.

62. When you exported this whiskey, you didn't have to pay the ninety cents on the gallon tax, did you?

A. No.

63. When you brought it back to this country you imported it to this country, and it could then lie in the customs warehouse three years, couldn't it, without your paying the avenue tax on it?

A. Yes, sir.

61 64. And you took advantage of all these chances for delay, did you not?

A. No, sir.

65. Didn't you generally do it?

A. No, sir.

66. In what form was this whiskey exported?

A. In barrels.

67. And when you sold it, you sold it in barrels, that is correct, isn't it?
A. Yes, sir.
68. You always dealt in whiskey?
A. We sold it mostly through warehouse receipts, and I suppose that is what you want to know.
69. You sold it through warehouse receipts, but by the barrel?
A. Yes, sir.
70. This whiskey during all the time that it was in Germany I now speak of the whiskey which you have admitted as your own over there——
62 A. Yes, sir.
71. This whiskey during all the time that it was in Germany was your property, was it not?
A. Yes, sir.
72. You had the warehouse receipts for them?
A. Yes, sir.
73. You negotiated those warehouse receipts and borrowed money on them, did you not?
A. Some.
74. Used them to borrow money at the Bank of Commerce and other banks.
A. Yes, sir.
75. In this City?
A. Occasionally.
76. Well, at one time, or the other, didn't you negotiate all these warehouse receipts?
A. No, sir.
77. How many of those warehouse receipts did you negotiate or use as collateral?
63 A. I could not tell you that.
78. The majority of them you uses?
A. I hypothecated them from time to time.
79. You still have some whiskey over there, have you not?
A. I am sorry to say I have.
80. Can you tell me what portion of this whiskey that you exported to Germany was sold in Germany, and what portion brought back to the United States by you or by any person to whom you sold it?
A. No, I could not tell you that.
81. Can't you give some estimate as to that?
A. Well, I would say possibly one-third was brought back by us.
82. And the balance was sold?
A. Sold here and over there.
83. Sold here and over there?
64 A. Yes, sir; on the warehouse receipts, export gauge.
84. On the warehouse receipts, export gauge?
A. Yes, sir.
85. I will get you to state Mr. Selliger if, on September 15th, 1899, September 15th, 1900, September 15th, 1901, September 15th,

1902, September 15th, 1903, and September 1st, 1904, you were the owner of any bonds except Government bonds?

A. No, sir.

86. During any of those years, on those respective dates, did you have any notes secured by mortgage?

A. No, sir.

87. Did you have any unsecured notes?

A. I don't recollect that; that would show in the list, I can't remember that now.

88. Please state for those dates what amount of cash you had on hand and on deposit?

A. I could not tell you that; it is on my sworn statement.

89. Did you give it all in on those respective dates, all the cash you had on hand and on deposit?

65 A. Yes, sir.

90. Did you give in those warehouse receipts on this whiskey that was located in Germany?

A. No, sir.

91. You never listed those?

A. No, sir.

92. Nor listed the whiskey?

A. No, sir.

93. At the time you exported this whiskey, what was the revenue tax per gallon?

A. Ninety cents.

94. What would have been the revenue charges on the seven thousand and five barrels in order to take it out of bond at that time?

A. Well the barrels varied; at forty gallons, and ninety cents per gallon, would be thirty-six dollars, the Government tax.

95. It would have been a considerable sum of money in order to have taken it out of bond at that time?

66 A. Considerable.

96. When you hypothecated these warehouse receipts, what sums of money were loaned on them by the various banks, how much per barrel on the whiskey?

A. I think we borrowed—we could not borrow over ten dollars on them at that time; I don't think you can borrow seven now.

97. Then that whiskey or the warehouse receipts as indicating the amount of barrels, permitted you to hypothecate them at a valuation of ten to seven dollars a barrel during these respective years?

A. From seven to ten—yes, sir.

98. Now, on September 15th, 1899, how much were you able to borrow on these warehouse receipts a barrel?

A. A good deal more than a great many were able to borrow on them.

99. Well, how much were you able to borrow on them?

A. Ten dollars a barrel.

100. On September 15th, 1900, how much?

67 A. Same amount.

101. On September 15th, 1901?

A. Same amount.

102. On September 15th, 1902?
A. Same amount.
103. On September 15th, 1903?
A. Same amount.
104. On September 1st, 1904?
A. Same amount.

Cross-examined by Mr. DODD:

105. Mr. Selliger, as a rule these foreign warehouse receipts were held by the bank as security, were they not?
A. Yes, sir.
106. And when you say you could borrow more on them than other people could, that you could borrow ten dollars per barrel, you mean your credit added that much strength to them?
A. That is what I mean to convey.
107. But as a rule what was the loan that the banks al-
68 lowed on them?
A. Well, the last six or seven years I think it was very difficult for anybody to borrow money on old whiskey in Europe, I don't think the banks cared to lend any money on them on account of not knowing what condition they were in.
108. Mr. Selliger, when these whiskies were exported, I will ask you whether or not they were not exported under the revenue forms prescribed by the Secretary of the Treasury of the United States?
A. Yes, sir.
109. I will ask you if you have a form under which they were exported before you now?
A. Yes, sir; this is the form—"Form No. 206—Revised August, 1895. United States Internal Revenue. Notice and Declaration of Intention to Export."

By Mr. DODD: I wish to offer this form in evidence as "Exhibit A".

110. Mr. Holt has asked you something about whether it was not your purpose to avail yourself of all the delays allowed by
69 law, bonded periods, &c. State whether or not any of this whiskey was exported for the purpose of evading any of the laws of Kentucky, or the United States?
A. Nor, sir; they were not. We thought it was more profitable to send them abroad, else we would have to tax pay them and keep them here.
111. You say there was a large over-production?
A. Yes, sir.
112. Now, Mr. Holt has gone into the sale of this whiskey while abroad. State whether or not this whiskey was exported for sale?
A. It was.
113. In good faith?
A. It was.
114. State about what proportion of it, as near as you can approximate, was actually sold while abroad?
A. Well, you have reference to Max Selliger & Company?

115. Yes, Max Selliger & Company?

A. Well, I think a little over half.

70 116. State what proportion, if any, was re-imported to Kentucky; just approximately, by you?

A. About one-third, I should say.

117. These whiskies which were sold abroad on the foreign warehouse receipts, on what gauge were they sold?

A. Export gauge.

118. On the gauge shown at the time they were exported?

A. Yes, sir; re-gauged at the time they were exported.

119. State whether or not these whiskies when they were originally exported over there—whether there was any intention on your part to re-import any part thereof thereafter?

A. No, sir.

120. Now, will you please state how it happened that you subsequently did re-import some; what causes led you to do it?

A. Because as the whiskies get older they were very hard to sell and the parties in this country that would purchase them didn't care to take chances on their condition and would not buy them

71 unless they were brought back to this country, and so virtually in the last six or seven years there was no sale for them abroad, that is, as far as our home consumption was concerned, and we brought them back and put them in Government bonded warehouses here, and paid the tax on them at the time they arrived.

121. State whether or not they were left in customs ware house for three years or until you could sell them?

A. The period varied that we could sell them; of course we could not keep them there.

122. Mr. Selliger, will you kindly tell the court what is the uniform rate at which the State Board of Valuation has assessed these whiskies when re-imported to this country?

A. For the last three years the valuation was seven and eight dollars per barrel, and the two years previous to that it was seven dollars per barrel.

123. Is that the rate that is fixed uniformly by the State during these periods on these whiskies that are mentioned here?

72 A. It is the rate fixed on all whiskies irrespective of their age or brand.

Redirect examination by Mr. HOLT:

124. That varies with different years, does it not?

A. I just said the last three years it has been eight dollars, and two years previous to that time it was seven dollars.

125. What make or brand of whiskey was this that you set forth in your answer here *or* owning, on these respective dates?

A. Two brands, Belmont and Astor.

126. And when was this made?

A. 1889, 1890 and 1891.

127. As a matter of fact, whiskey as it grows older is worth more, is it not?

A. It ought to be.

128. When you exported this whiskey, it was taken over as ballast, was it not?

A. I think not.

129. And the export charges, that is, the transportation charges were very low?

73 A. They charged two dollars and fifty cents per barrel over, I don't think that would be ballast.

NATHAN M. URI, called in behalf of the plaintiff, being duly sworn, and examined by Mr. Holt, testified as follows:

1. Please state your name?

A. Nathan M. Uri.

2. Your business?

A. Wholesale liquor dealer and distiller.

3. How long have you been in the whiskey business as a wholesale liquor dealer and distiller?

A. Well, I have been a wholesale liquor dealer since I was twenty-one years of age, that is pretty near thirty-two years over thirty years.

4. I will get you to state what you know about the over-
74 production of whiskey during the years 1891, 1892, and 1893 and along there?

A. There was a very large over-production of whiskey.

5. And what was the price for whiskeys in this State about that time, during 1893, say?

A. 1893 or 1894 they were sold nearly below the cost of production.

6. And what was the cause of this cheap price?

A. Over-production.

7. During that time don't you know it to be a fact that a great deal of whiskey was exported from the United States to foreign countries for the purpose of not at that time paying the revenue tax of ninety cents a gallon?

A. Won't you divide your question?

8. Don't you know it to be a fact that about the year 1893 an immense amount of whiskey was exported, from this country?

A. Well, I can't state the exact year, but I know a great deal was exported from the United States to Bermuda, Germany,
75 France, &c.

9. What was the purpose of that exportation at that time?

A. Well, my opinion was that the tax on whiskey was about forty dollars a barrel—Thirty-six or Forty dollars a barrel, and by exporting it the distiller or whoever was the owner of it would save paying the Government that Thirty six to Forty Dollars a barrel and save the interest on it, and by taking it to some foreign country they would leave it there as long as they desired.

10. Without——

A. Without paying the United States Government any tax.

11. About the date of the exportation of this whiskey, that is, about 1893, wasn't whiskey at a very cheap or very low price per barrel?

A. The price was low.

12. If a man had paid the revenue tax at that time of ninety cents a gallon, and had attempted to have sold a barrel of
76 whiskey at that time in the regular course of trade, would or would he not have made anything over and above the cost of production and the revenue tax?

A. Yes, sir; on a barrel of whiskey he would have.

13. Well, on an immense amount of whiskey, say seven thousand barrels?

A. Seven thousand barrels, that is a question I have never entered into; I don't know what was done in that line.

14. What profit at that time would he have been made on say a barrel of whiskey or a number of barrels?

A. Well, I can only answer that on a general way, it all depended on the brand of whiskey, its quality, &c.

15. Well, the Belmont and Astor brands, we will say?

A. The Belmont and Astor brands were always considered first class whiskies, which brought good prices.

16. Mr. Uri, what would seven thousand and five barrels of Belmont and Astor whiskey have been worth in Germany on September 15th, 1899, in the ware house over there?

A. Well, I don't know what export goods were worth, I haven't handled any for a great many years.

77 17. How long since you handled export goods?

A. Well, the last knowledge I have of handling any large quantities of exports was previous to 1893; I have never handled any large quantities since.

Cross-examined by Mr. DODD:

18. Mr. Uri, you never exported any whiskey either, did you?

A. No, sir.

19. You don't know of any Belmont or Astor being sold for less than cost of production?

A. I don't know anything about the sale of Belmont or Astor in export.

20. You deal exclusively in blended whiskies, don't you?

A. No, sir.

21. Well, what kind of whiskies do you deal in?

A. Well, I handle a great many whiskies of the character of the Belmont and Astor, and Pennsylvania rye.

22. Principally what is called blended or rectified goods?

78 A. No, sir; you are mistaken.

Maj. W. H. THOMAS, called in behalf of the plaintiff, being duly sworn, and examined by Mr. Holt, testified as follows:

1. State your name?

A. W. H. Thomas.

2. Are you in business in the City of Louisville?

A. I am.

3. What sort of business?

A. I am in the wholesale liquor business.

4. How long have you been in the wholesale whiskey business here?

A. I commenced here at Louisville on the 4th day of February, 1870 as an employé of the Newcomb-Buchanan Company.

5. And you have been familiar with the wholesale liquor
79 business ever since that date?

A. I think so.

6. Have you ever exported any whiskies to Hamburg or Bremen, Germany?

A. A great many, in 1890, I quit the Newcomb-Buchanan Company and went into business for myself, under the firm name of W. H. Thomas & Son, and exported possibly as much whiskey as any house in the country at that time, W. H. Thomas & Son.

7. How much whiskey from 1880 until say 1895, did you export?

A. Well, all that I exported was up to 1893; I exported none afterwards.

8. Well, how much between those dates did you export?

A. Up to 1893?

9. Yes?

A. Possibly from ten to fifteen thousand barrels; I can't tell without examining the books.

80 10. About 1893, isn't it a fact that there was a vast over-production of whiskey, and whiskey was very cheap here by reason of that over-production?

A. Mr. Holt, I have got no right to dictate to you as a lawyer, but I would like for you to ask what became of that whiskey I exported.

11. What became of that whiskey that you exported?

A. In 1894 W. H. Thomas & Son became insolvent and they turned over all that whiskey to their assignee and lost sight of it, it passed out of their hands. I just want to make my record straight.

12. About 1893, isn't it a fact that there was a vast over-production of whiskey, and whiskey was very cheap here by reason of that over-production?

A. Yes, sir.

13. About that time a considerable quantity of whiskey was exported from Germany to Kentucky, was there not?

A. Oh, a world of it.

81 14. How much in your judgment was exported about that time?

A. When I was exporting?

15. Yes.

A. Somewhere between two hundred and fifty and three hundred thousand barrels.

16. What was the purpose of that exportation to Germany at that time; was there any demand for it in Germany at that time?

A. There was no demand for it, practically no demand for it in Germany.

17. Well, why was it exported?

A. In my opinion a great many like myself believed by exporting it that the time would come that if it was not bought in Europe by some people that would introduce America- whiskies over there, it

cost less to keep it there than it did here, that we could bring it back to this country if we could not find buyers for it in Europe, and bring it back here, and that they had good storage and it would improve there, it would be in good condition and it would bring
82 a good price and help us out. Other men were rich, those that had plenty of credit and plenty of money, looked at it in a business way and said they could keep it cheaper in Europe than they could here; if they could not sell it in Europe then they could bring it back here and sell it here. Others just concluded that there was so much of it made, that the state had so largely overproduced, that maybe the price would never get any better. Then there were other reasons. In the meantime the wholesale whiskey dealer of the country, the man that used to buy it, lost interest in it, and they concluded it was getting too old for them and they could make better whiskey in their stores than the men could in their distilleries, these compounders, rectifiers and blenders, and they made war upon it and told the trade throughout the country that it was no good, because nearly all that has been shipped to Bermuda had been destroyed, from the fact that it was put into chalk cliffs in the sides of hills, no ventilation, and it come back, shipped out there a hundred proof and over, and come back seventy-five to eighty and eighty-five, that destroyed its value. The rectifier and
83 the jobber took advantage of all those things, and they tabooed the finest blends of Kentucky whiskey.

18. Are you familiar with the Belmont and Astor brands of whiskey?

A. Yes, sir.

19. How long have you been familiar with those brands?

A. Ever since they were first made.

20. Are you familiar with the price at which they sell and so on?

A. Moore and Selliger were among the foremost and best distillers in the State of Kentucky; they made whiskey in the very best style, and they got a good price for it, and they did everything to maintain the character of Kentucky whiskey, and they made it a first class article.

21. In your opinion, on September 15th, 1899, how much per barrel was this whiskey of Max Selliger's worth in Germany how much per barrel?

A. Well, I don't know that I can answer that question as to what it was worth; I could only answer it so far as W. H.
84 Thomas & Son Company was concerned, the corporation that was formed after the bankruptcy of W. H. Thomas & Son; that corporation was formed without any capital and without and credit and they went into business, and in their various transactions they bought four thousand barrels of Astor and Belmont and Nutwood.

22. Did you buy them in Germany?

A. Bought it in Europe.

23. What did you pay for it per barrel?

A. About $12.50 per barrel.

85 STATE OF KENTUCKY, *Jefferson County, ss:*

I, Alonzo Walker, a Notary Public in and for said County and State, certify that the foregoing 35 pages contain a full, true and accurate transcript of the testimony introduced at the trial of said case.

Witness my hand and Official Seal, this 6th day of October, 1905. My commission expires February 24th, 1906.

____ ____,
Notary Public, Jefferson County, Ky.

It is agreed between counsel for plaintiff and counsel for defendants that the foregoing is a true and accurate copy of the transcript of the evidence taken and used in the foregoing case, the original whereof having been lost or mislaid. It is further agreed that in the event the original is not found and lodged with the papers in this cause the foregoing shall be read in evidence as a copy thereof. This January 30, 1906.

M. J. HOLT,
Attorney for Plaintiff.
DODD & DODD,
Attorney- for Defendant.

86 At a Court held on the 13th day of January, 1906:

This action was set at rules by the plaintiff on the 8th inst. On motion of the defendant, by counsel, it is ordered by the Court that this action be and it is remanded to the rules.

At a Court held on the 23rd day of January, 1906:

By consent of counsel for both plaintiff and defendant this cause is set for hearing on Tuesday, January 30th, 1906.

At a Court held on the 27th day of January, 1906:

This action was set at rules by the plaintiff on the 22nd inst.

87 At a Court held on the 30th day of January, 1906:

Came parties, by counsel, and this action having been fully heard, and the Court not being advised, ordered that it be and is submitted.

At a Court held on the 24th day of February, 1906:

The Court being advised, delivered a memorandum of opinion endorsed on the wrapper of the pleadings which is ordered to be and is now filed and made a part of the record herein.

Said opinion filed herein on the 24th day of February, 1906, is as follows, to-wit:

I am of the opinion that the judgment of the Jefferson County Court was right and should be affirmed. I do not agree, however,
88 that the tax sought to be levied was all export tax or a tax upon exports prohibited by section 10 of the first article of the Federal Constitution. The imposts and duties therein prohibited clearly mean a single imposition of a tax upon property in

course of exportation and not a general tax laid upon all property alike from year to year. (Col. *vs.* Errol, 116 U. S. 517, Turpin *vs.* Burgess, 117 U. S. 506.)

But, the property being beyond the jurisdiction of Kentucky and located in Germany during the time for which the annual tax is claimed the State of Kentucky had no right to tax it and to do so would be a taking of property without due process of law within the meaning of the provision of the Federal Constitution. (Union Refrigerator Transit Company *against* Kentucky, 199 U. S. 194.)

SHACKELFORD MILLER, *Judge.*

At a Court held on the 27th day of February, 1906:

This cause having been argued and submitted in chief on the plaintiff's appeal from the judgment of the Jefferson County Court of December 4th, 1905, dismissing the complaint
89 of plaintiff and the Court being now sufficiently advised, is of the opinion that the said judgment should be affirmed.

It is therefore considered and adjudged that the plaintiff's petition be and it is dismissed.

At a Court held on the 6th day of March, 1906:

Now comes the plaintiff, Commonwealth of Kentucky by etc. and files and makes this its motion to vacate the judgment entered in this case on February 27th, 1906, and grant the defendant a new trial herein:

First. That the judgment is contrary to the evidence in that the evidence clearly establishes that the whiskey sought to be subjected for taxation or the warehouse receipts had a situs in Kentucky.

Second. That the judgment is contrary to the law in that the situs of the whiskey sought to be taxed and its constructive possession was in Kentucky. That the situs of the warehouse receipts was
90 in Kentucky because same are negotiable instruments and the constructive possession of said whiskey and the situs of the same is at the domicile of the owner of the warehouse receipts; to which the defendants object and the Court being advised overruled said motion; to which the plaintiffs by counsel except.

At a Court held on the 6th day of March, 1906:

This cause coming on to be heard upon the pleadings exhibits and proof and the Court being advised adjudges:

That the whiskey, to-wit:

1900 as of Sept. 15th, 1899	7005 barrels
1901 as of Sept. 15th, 1900	6030 barrels
1902 as of Sept. 15th, 1901	4250 barrels
1903 as of Sept. 15th, 1902	2566 barrels
1904 as of Sept. 15th, 1903	1611 barrels
1905 as of Sept. 1st, 1904	1564 barrels

in Bremen and Hamburg, Germany, on the various assessment dates was not subject to assessment for taxation for State
91 and County purpose nor were the warehouse receipts representing same subject to assessment for taxation.

It is therefore adjudged by the court that the defendants omitted no property of any class, character or form from the assessment for taxation. The judgment of the Jefferson County Court is affirmed, to which order and judgment the plaintiff excepts and prays an appeal to the Court of Appeals, which is granted.

92 STATE OF KENTUCKY, *County of Jefferson, Sct:*

I, W. L. Weller, Jr., Clerk of the Jefferson Circuit Court, in and for the County and State aforenamed do hereby certify that the foregoing 91 pages contain a full true and complete transcript of the record and proceedings in the case wherein the Commonwealth of Kentucky, by etc., is plaintiff and Max Selliger, etc., are defendants, No. 41788, an action lately pending in the aforesaid Court, Chancery Branch, First Division, as the same appears of record and now on file in my said office.

Witness my Hand, as aforesaid, this 13th day of March, 1906.

W. L. WELLER, Jr.,
Clerk of the Jefferson Circuit Court,
By LEWIS MERIWETHER,
Deputy Clerk.

Fee $21.00.

93 And with said transcript, the appellant filed a statement, and which is in words and figures as follows, to-wit:

94 Court of Appeals of Kentucky.

COMMONWEALTH OF KENTUCKY, by GEO. H. ALEXANDER, Revenue Agent for State at Large, Appellant,
vs.
MAX SELLIGER ET AL, Appellees.

Statement.

The appellant prosecuting this appeal is Commonwealth of Kentucky, by Geo. H. Alexander, Revenue Agent for State at Large; the name of the appellee against whom this appeal is prosecuted is Max Selliger doing business under the trade name of Max Selliger & Company and Max Selliger individually.

The judgment appealed from was rendered on February 27, 1906, and was amended after a motion for a new trial by appellant on March 6, 1906, and said judgments are found on pages 89 and 91 of the record.

The appellant desires no summons to be issued upon appeal and wishes no warning order to be made.

COMMONWEALTH OF KENTUCKY,
BY, ETC.,
M. J. HOLT, *Attorney.*

B. F. WASHER,
Of Counsel.

95 Be it remembered that on the 18th day of May 1906 at a Court of Appeals held at the Capitol at Frankfort the following order was entered—

Commonwealth of Ky. by etc. *v.* Selliger etc. Jefferson.

This case is ordered to be submitted with 10 days' leave to appellee to file brief.

Be it remembered that on the 16th day of January 1907 at a Court of Appeals held at the Capitol at Frankfort, the following Judgment was entered to-wit:

COMMONWEALTH, for use, etc., Appellant,
vs.
MAX SELLIGER, ETC., Appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, 1st Division.

The Court being sufficiently advised, it seems to them the judgment herein is erroneous.

96 It is therefore considered that said Judgment be reversed, and cause remanded for proceedings consistent with the opinion herein, which is ordered certified to said Court.

It is further considered that the appellant recover of the appellee his costs herein expended.

And on said date the Court delivered the following opinion, which is in words and figures as follows:

97 Court of Appeals of Kentucky.

Jan. 16, 1906. (To be Reported.)

COMMONWEALTH, for Use, etc., Appellant,
vs.
MAX SELLIGER, ETC., Appellees.

Appeal from Jefferson Circuit Court (Chancery, 1st Div.).

Opinion of the Court by Chief Justice O'REAR:

Appellee Max Selliger was the owner of a large quantity of whiskey in bond for more than five years before the institution of this proceeding in the Jefferson County Court to require him to list the whiskey, or the warehouse receipts evidencing it, for taxation, as omitted property. Selliger had owned the whiskey for a number of years. It had not been removed from the distillery bonded

98 warehouse in Kentucky, where it was stored under the provisions of the revenue laws and regulations of the United States until the Internal Revenue tax on it had been paid. Just before the expiration of the period when, under the Statutes of the United States, it was required that the Internal Revenue tax upon it be paid and the whiskey removed, appellee Selliger, owner of say 8000 barrels of the whiskey, removed it for export. Under the pro-

visions of the U. S. Statutes that was allowed, the federal government in that event renouncing its taxes against it. All State taxes were paid on it up to that time. The whiskey was exported to Hamburg and Bremen in Germany, where it was stored in public warehouses in the name and for the benefit of the consignor. The warehousemen issued warehouse receipts therefor to the consignor, who was also the consignee. Appellee Selliger had the possession and the title of these receipts until they were sold, which was within the period for which they are sought to be taxed, some of the whiskey represented by them having been reshipped—probably a third or more of it—to the United States and some to Kentucky. The con-
99 tentions of the Auditor's Agent in this proceeding to tax the property are, (1) that the exportation of the whiskey was done in order to escape the payment of taxes upon it, and as it was then intended to re-import it to the United States and to Kentucky, the character of the title and possession of the owner was never changed, and it was consequently subject to taxation in Louisville, Ky., the domicile of its owner. (2) That if the situs of the whiskey be deemed to have been fixed in Germany by reason of the exportation, the warehouse receipts were nevertheless property, which being in Kentucky where the owner resided, were taxable here.

Appellee's contention is that neither the whiskey nor the warehouse receipts were taxable in Kentucky, because under section 10 of Art. 1, Constitution of the United States, providing:

"No State shall, without consent of the Congress, lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws,"

100 it was not within the power of the State to levy a tax upon property which had been or was being exported.

Whether the inhibition of the Federal Constitution be against the levying of a tax, by way of impost or duty, upon the act alone of exporting property, we do not deem it necessary to decide in this case. It may be safely conceded that to levy a tax upon exported property which should operate indirectly as the laying of a duty upon the export is as pernicious as to lay it directly. We do not find the slightest evidence of a purpose on the part of the State to lay a duty on the whiskey because it was exported, by imposing the tax in question. On the contrary, the tax is levied upon all personal property owned by citizens of this State, wherever situated (if subject at all to the taxing jurisdiction of the State) upon the sole theory that its situs for the purposes of taxation is the domicile of the owner, and as the owner resides here, and has the benefit of the protection of the laws and government of this State over his person, he should, in proportion to the wealth which attends his
101 person, bear his share of the expense of the State government.

Although the taxing statute of this State provides:—(section 4020 Ky. Statutes.)

"All real and personal estate within this State, and all personal estate of persons residing in this State, * * * shall be subject

to taxation unless the same be exempt from taxation by the Constitution,"

it must be construed not to mean personal estate owned by persons residing in this State, but which is tangible and permanently located in other States and employed there in the prosecution of the owner's business. Such property, not enjoying any benefit or protection from the laws of this State, but deriving such benefit wholly from the laws of the State where situated, for which it is presumably taxed there, is not deemed within the taxing jurisdiction of this State. Union Refrigerator Tr. Co. *v.* Kentucky, 26 Sup.
102 A. Rep.—U. S. 36.)

We do not apprehend that the motive of the exporter could ever safely be inquired into. For if a State could say to such we find the fact to be that you are not exporting in good faith for sale or permanent location of your property abroad, therefore we will tax it notwithstanding it is export merchandise, in that way the State could vexatiously interfere with a subject over which Congress has been ceded the entire control. It is safer to treat the property exported as being thereafter within the jurisdiction of the government within whose territory it may be lodged. The whiskey in the case at bar having been stored in a warehouse in Germany, where it became a part of the mass of property within the German Empire, doubtless owed a duty to pay taxes to the support of that government while there. The State of Kentucky neither had nor should attempt to exercise further jurisdiction over it for any purpose.

The warehousemen in Germany who issued ware house re-
103 ceipts for the whiskey created a distinct property in the receipts. While in a sense they represented the whiskey, being its symbol for certain purposes, it could scarcely be maintained, for it is not true, that they stand in lieu of the whiskey for all commercial purposes. Like all symbols they are fictions; so are promissory notes, and bonds. Each is a representative or evidence of something else. Yet everywhere each has an individual value, derivative, it is true, from the thing upon which it is rested, yet is deemed distinct property. A bond is an evidence of the promise of its maker to pay its face at a time ascertainable. Its original commercial value depends upon the value of the security supporting it—whether it be the solvency of its maker, his credit, or the hypothecation of collateral to insure its being redeemed. Its endorser may add to its original value as property by his solvency, and so forth. Yet as so much paper it is valueless whether for taxation or trade. It may rest for the security of its redemption upon real estate, or for that matter whiskey, mortgaged, while it derives its value as a commercial
104 asset in part, or maybe in whole from the mortgaged property, securing it, it is always and everywhere deemed property of the value which it may have in the market, and may be taxed although the property mortgaged to redeem it is beyond the taxing district, and may also be taxed where it is situated.

A warehouse receipt partakes of some of the same features. Its original value may depend entirely on the value of the chattel it represents, and which is deemed to be in pledge to redeem it. But such

receipts are generally negotiable, as bonds and bills of exchange are. Each endorser may add materially to their value. They float upon the markets of the world as property, as surely as bonds are property. Whoever owns them, owns that much of assets having such value as the market affords to them, which may be sold, hypothecated, attached for debt, and are the subject of inheritance. Like other choses in action their situs is that of their owner. His security and comfort given to him by government, enable him to hold and enjoy them.

Nor is it true that as they are issued upon his whiskey, they are in effect evidence merely of his title, as his deeds to his lands in a foreign State may be. Title deeds in this country are not such property as that they have an independent value, or a market value. The warehouseman who stores whiskey, becomes its bailee; he has a special property in it; he who lodged it there exchanges it to the warehouseman for the latter's negotiable receipts, commercial paper, promises to redeem, and independent of the receipts the former owner no longer has the property in the whiskey, any more than the mortgagee has the property in the mortgaged chattel.

We are of opinion, and without hesitation hold, that warehouse receipts, wherever issued, and whatever they may represent, are intangible personal property, whose situs for purposes of taxation is the domicile of their owner. They may be and should be taxed at his domicile at such value as they may have had on the day fixed by the Statute for listing property generally for taxation.

Wherefore the judgment is *reversed,* and cause remended for proceedings consistent herewith.

M. J. Holt, Ben. F. Washer, for Appellant.

Dodd & Dodd, for Appellees.

Be it remembered that afterwards on the 5th day of February 1907 at a Court of Appeals, held at the Capitol at Frankfort, the following order was entered, to-wit:

COMMONWEALTH, ETC.,
v.
SELLIGER, ETC.

Jefferson.

Came the appellees by counsel and filed a petition, and moved the court for a rehearing, or a modification and extension of the opinion herein, and also moved the Court for an oral argument on the petition for rehearing, which motions are submitted.

The petition mentioned in the foregoing order is in words and figures as follows, to-wit:

108 Court of Appeals of Kentucky.

COMMONWEALTH OF KENTUCKY, by GEORGE H. ALEXANDER, Revenue Agent, Appellant,
versus
MAX SELLIGER, Appellee.

Petition for Rehearing or Modification and Extension of Opinion and Mandate.

May it please the Court:

By reference to the pleadings, in this case, it will be observed that Max Selliger expressly admitted that at the periods complained of in the statement of the Revenue Agent he was the sole and exclusive owner of the following tangible property located in
109 the Empire of Germany, as of the dates complained of and set forth in the pleadings, to wit:

September 15, 1899..... 7005 barrels;
September 15, 1900..... 6030 barrels;
September 15, 1901..... 4250 barrels;
September 15, 1903..... 1611 barrels;
September 1, 1904..... 1564 barrels (R. 19),

and that all of this property was then located in the cities of Bremen and Hamburg, in the Empire of Germany.

In a casual way it appeared, in some of the pleadings, that Selliger held warehouse or storage receipts for these barrels of distilled spirits. The argument of the case, both in the County Court and in the Circuit Court, and also in this Court, was upon the questions whether this property having an actual situs in a foreign jurisdiction, was taxable in Kentucky, by reason of the fact that
110 its owner resided here, and whether, as these distilled spirits were exported under the revenue laws of the United States and the United States had renounced all taxes upon same, taxation by Kentucky would not be violative of those provisions in the Constitution of the United States prohibiting any State from levying an export tax, and also whether, under the circumstances, a taxation of these distilled spirits was not violative of the provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States. The only use that was made of the fact, incidentally brought out in the course of the trial, that Selliger held warehouse or storage receipts for these distilled spirits, was as an argument that as such warehouse or storage receipts were held here, the property called for by such receipts should be considered as constructively located here.

As to the question whether the tangible property, having an
111 actual situs in a foreign jurisdiction and not being taxable, the warehouse or storage receipts were in and of themselves taxable, this was not debated. It is natural, therefore, for us to have somewhat a feeling of chagrin to find that this court, having

decided substantially all of our law questions for us, has upon a point not debated, decided the case against us. We, therefore, respectfully submit that we are entitled to consider this question at some length.

In its opinion this court specifically held as follows:

"The whiskey, in the case at bar, having been stored by appellee in a warehouse in Germany, where it became a part of the mass of the property within the German Empire, doubtless owed a duty to pay taxes to the support of that government while there. The State of Kentucky neither had nor should attempt to exercise further jurisdiction over it for any purpose. Such property, not
112 enjoying any benefit or protection from the laws of this State, but deriving such benefit wholly from the laws of the government where situated, for which it is presumably taxed there, is not deemed within the taxing jurisdiction of this State.

"The warehouseman in Germany, who issued warehouse receipts for the whiskey, created a distinct property in the receipts. * * * Everywhere each (receipt) has an individual value, derivative, it is true, from the thing upon which it rested, yet is deemed distinct property. A bond is an evidence of the promise of its maker to pay its face at a time ascertainable. * * * Its endorser may add to its original value as property by his solvency. Yet as so much paper it is valueless whether for taxation or trade. * * * It is always and everywhere deemed property of the value
113 which it may have in the market, and may be taxed although the property mortgaged to redeem it is beyond the taxing district, and may also be taxed where it is situated. A warehouse receipt partakes of some of the same features. * * * Such receipts are generally negotiable as bonds and bills of exchange are. They float upon the markets of the world as property, as surely as bonds are property. * * * Like other choses in action their situs is that of their owner. * * * We are of opinion, and without hesitation hold, that warehouse receipts, wherever issued, and whatever they may represent, are intangible personal property, whose situs for purposes of taxation is the domicile of their owner."

The exact situs-title and location of this exported whiskey are defined in the testimony, taken by appellant, as follows:

114 "108. Mr. Selliger, when these whiskies were exported, I will ask you whether or not they were not exported under the revenue forms prescribed by the Secretary of the Treasury of the United States?

A. Yes, sir.

110. Mr. Holt has asked you something about whether it was not your purpose to avail yourself of all the delays allowed by law, bonded periods, etc. State whether or not any of this whiskey was exported for the purpose of evading any of the laws of Kentucky or of the United States?

A. No, sir; they were not. We thought it was more profitable to send them abroad else we would have to tax pay them and keep them here.

115 112. Now, Mr. Holt has gone into the sale of this whiskey while abroad. State whether or not this whiskey was exported for sale.

A. It was.

113. In good faith?

A. It was." (R. 47, 48.)

116 *The Legal Effect of these Storage or Warehouse Receipts Issued to Appellee Upon His Deposit of the Whiskey in the German Warehouses.*

It will hardly be disputed that the German Empire has never adopted or been controlled by the common law; but, even at the common law, storage or warehouse receipts never were negotiable. They were only memoranda identifying the goods belonging to the person depositing them, and the acknowledgment, on the part of the warehouseman, that they were held on storage for his account. They were non-negotiable and were valuable only in the event of any dispute between the warehouseman and the owner as to whether such particular goods had been placed on storage with him, and as such, were only evidences of title to such goods.

117 A warehouse receipt is nothing more nor less than a document of title, and has always been so treated. One of its uses it as a means by which delivery can be made of an article of personal property which has been sold.

In 2 Benjamin on Sales, 1043, it is said:

"There may be symbolical delivery of goods, divesting the vendor's possession and lien. Lord Ellenborough said, in Chaplin *v.* Rogers, 1 East. 192, that 'where goods are ponderous and incapable of being handed over from one to another, there need not be an actual delivery, but it may be done by that which is tantamount, such as the delivery of the key of a warehouse in which the goods are lodged, or by the delivery of other indicia of property.'"

We pause to say that no one would contend that the possession by a resident of Kentucky of a key to a warehouse in Germany

118 would make the key taxable as representative of the value of the goods in the warehouse.

In 10 A. & E. Encyc. of Law, 1, under the title "Documents of Title," there is a note, in which it is stated:

"By the Factors' Act of 5th and 6th Victoria, a document of title is stated to mean any bill of lading, India warrant, dock warrant, warehouse-keeper's certificate, warrant or order for the delivery of goods or any other document, in the ordinary course of business, as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented."

It is to be noted that, among other things described as documents of title, is a warehouse receipt.

119 In the leading case of Gibson *v.* Stevens, 8 How. (U. S.) 399, 400, the court said:

"In the opinion of the court, it (storage or warehouse receipt) transferred to him the legal title and constructive possession of the property; and the warehouseman from the time of its transfer became his bailee, and held the pork and flour for him. The delivery of the evidences of title and the orders endorsed upon them was equivalent, in the then situation of the property, to the delivery of the property itself. * * * A ship at sea may be transferred to a purchaser by delivery of a bill of sale. So as to the cargo by the endorsement and delivery of the bill of lading. The articles in the warehouse at Ft. Wayne were incapable of actual delivery; consequently the delivery of the evidences of title, with the order to the bailees endorsed on them, passed the title and possession to
120 the plaintiff. The endorsement of the delivery order upon his evidence of title, like the endorsement upon a bill of lading, sufficiently manifests the intention of the parties that the title and possession should pass to Gibson."

The appellee never endorsed nor sold any of this whiskey. The above ruling has been steadily adhered to and followed by the Supreme Court in the following cases:

Leonard *v.* Davis, 1 Black, 482-3.
Holliday *v.* Hamilton, 11 Wall. 564-5.
The Thames, 14 Wall. 106.
Crapo *v.* Kelly, 16 Wall. 640.
Insurance Co. *v.* Kiger, 103 U. S. 556.
Union Trust Co. *v.* Wilson, 198 U. S. 538-9.

and by the United States Circuit Court of Appeals for the
121 Second Circuit in
Blydenstein *v.* Security Trust Co., 67 Fed. Rep. 469.

It has been repeatedly held, by the different State courts of our country, that a warehouse receipt is not technically a negotiable instrument, but merely stands as evidence of title to the property it represents.

Warehouse receipts for goods left on storage are not promissory notes for the payment of money.

The receipts, issued by the German warehousemen, only imposed upon them, in favor of the appellee, Max Selliger, as the holder thereof, an obligation to preserve the property stored, and to deliver and surrender the specific whiskey therein described according to the terms of the receipts. The warehousemen derived no title to or other interest in the property than for their storage charges. In the absence of statutory provisions a warehouse receipt is not
122 negotiable, and does not convey any title to the warehouseman, but the same remained in the depositor of the goods, subject to a lien for the storage charges. The effect of the endorsement and delivery of warehouse receipts must be determined by the law of the place of storage.

The endorsement and delivery of a warehouseman's receipt does not convey the contract itself, but only the property thereby represented, and is merely the evidence of the holder's title. The fol-

lowing authorities, among many others, sustain the above proposition:

Hall *v.* Pillsbury, 7 L. R. A. 529.
Hale *v.* Milwaukee Dock Company, 29 Wis. 482, 9 Am. St. Rep. 603.
Chicago Dock Company *v.* Foster, 48 Ill. 507.
Rahilly *v.* Wilson, 3 Dill. 420.
Hallgarten *v.* Oldham, 135 Mass. 1, 46 Am. St. Rep. 433.
123 Allen *v.* Maury, 66 Ala. 10.
Solomon *v.* Bushnell, 11 Or. 277, 50 Am. St. Rep. 475.
Bank *v.* Walbridge, 19 Ohio St. 419, 2 Am. St. Rep. 408.
Hubbell *v.* Skiles, 16 Ind. 138.
Dole *v.* Olmstead, 36 Ill. 150, 85 Am. Dec. 38.
Burton *v.* Coryea, 40 Ill. 320, 89 Am. Dec. 350.
Century Digest, Vol. 48, pp. 2038, *et seq.*

The storage or warehouse receipts, covering the whiskey sought to be taxed, were issued in Germany and by German warehousemen according to German laws. Their legal effect is necessarily controlled by the laws of the German Empire, which are neither pleaded nor proved in this case. It is, therefore, to be presumed that this is the common law, although of course we know it is the civil law.

This court has erroneously attempted to apply to this case
124 its conception of the Kentucky law governing warehouse receipts. We confidently submit that the Kentucky warehouse law has no application of any kind whatsoever to the case at bar. We further claim that the opinion of this court directly contravenes the plain and manifest meaning of the two Federal constitutional provisions specifically pleaded and relied on as they have been construed by the Supreme Court in the cases of

Union Refrigerator Co. *v.* Kentucky, 191 U. S. 194.
Delaware R. R. Co. *v.* Pennsylvania, 198 U. S. 431, and also in
Ferry Co. *v.* Kentucky, 188 U. S. 385, as well as in
Ayer & Lord Tie Co. *v.* Kentucky, 202 U. S. 499, and in
Brown *v.* Maryland, 12 Wheat. 419, and in
Norfolk Ry. Co. *v.* Sims, 191 U. S. 449.
and in many other cases.

125 The effect of the opinion of this court, in the case at bar, is to impose double taxation on a single unit and title owned exclusively by the appellee. It can not be denied that the whiskey, represented by the storage receipts held by appellee, is tangible property, and that the sole title thereto belonged to the appellee.

It can not be controverted that the German warehousemen were only bailees of the said whiskey, holding the same for the exclusive benefit of appellee. They had no title to the whiskey, and their only interest therein was limited to their storage charges. The storage or warehouse receipts, issued by the German warehousemen to appellee, were mere evidences of title and of identification, representing nothing more than the appellee's exclusive title to the said whiskey. This whiskey, being tangible property and confessedly

located beyond the territorial jurisdiction of the United States,
126 and of the State of Kentucky, can not be lawfully taxed in Kentucky.

The proprietary ownership, both of the whiskey and of the storage receipts, was merged in and belonged exclusively to the appellee. The whiskey, being tangible property, was taxable in the territorial jurisdiction where the same is located. Now to tax the appellee in that territorial jurisdiction for the whiskey, and, at the same time, tax him in the Kentucky jurisdiction on his storage receipts therefor, would be obviously and manifestly double taxation on a single unit, and a manifest evasion and violation of the two clauses of the Federal Constitution specially pleaded and relied on by appellee.

Kentucky Law.

Even under the Kentucky Statutes neither this whiskey nor the storage or warehouse receipts therefor are taxable in Kentucky,
127 because the whiskey is tangible property and was located beyond the territorial boundary of this State at the periods of assessments.

This court has decided, in a number of cases, especially in
Commonwealth *v.* Taylor, 101 Ky. 330, and
Commonwealth *v.* Rosenfield, 118 Ky. 387, that

"This species of property occupies a unique position in its relation to other property and to the revenue laws of this State. * * * The United States Government has long exercised the most absolute surveillance over the manufacture, sale, and handling of this peculiar commodity. All distilleries in which it is made, are required to be registered, and are in absolute control of the Federal Government through its officers. * * * The actual possession of these whiskies is held and retained by the Government for
128 the payment of taxes due thereon. Neither the distiller himself, nor any one else, is permitted to enter these warehouses except in the presence of the Federal officers, and then only for the purpose of repairing packages or removing them after the taxes of the United States Government have been fully discharged. Whilst the whiskey is in bonded warehouses, in the custody of the United States Government, its right to the possession of the property is supreme, and there is no power in the State to subject it either to the demands of the State, or to the claims of creditors until the lien of the Government for its taxes has been fully discharged and the possession of the property surrendered to the owner. * * * Under these circumstances the Legislature, in effect, made the distillers the agents of the State to collect from the owners of the whiskey their taxes. * * * From the necessities of the case the present method of assessing a tax on this species of property
129 has been evolved as the best and most efficacious means of securing to the State its revenue."

We have shown that this whiskey was exported in bond and that the Federal taxes were renounced. The Federal Constitution (Subsec. 5 of Section 9, Article 1) forbade the Federal Government from

imposing any tax on articles exported from any State, just as, in Section 10 of the said article, it forbade any State from imposing any taxes upon such exported articles.

Therefore, when the appellee exported this whiskey, the Federal Government, pursuant to the provisions of Section 3330, of the U. S. Rev. Statutes, formally renounced and relinquished its prior claims for taxes against the same.

Under our system of laws the Federal Government has a primary lien upon and the exclusive possession of all whiskey, distilled within its territorial boundary, to secure a very large Internal Revenue tax per gallon thereon. But it was bound to renounce and relinquish, as it did, this paramount tax on such articles as might be exported, and the effect of such renunciation necessarily carried with it the renunciation of its subordinate geographical subdivisions or States. The greater necessarily included the lesser territorial boundary.

130

The present opinion of this court, in this case, finds that all State and county taxes were paid up to the time of such exportation and such renunciation by the Federal Government. The whiskey, therefore, ceased thereafter to be any part of the mass of taxable property within the United States, or of any portion thereof, and until the same might thereafter be reimported and should then become a part of the mass of the taxable property of the State into which it might be brought.

Section 171 of the Kentucky Constitution provides, among other things, as follows:

"Taxes shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general law."

131

It is true that the Legislature, in Section 4020 of the Kentucky Statutes, originally provided, among other things, that

"All personal estate of persons residing in this State, whether the property be in or out of this State, including intangible property, shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale."

But so much of this statute as undertook to tax tangible personal property, permanently located outside of the State of Kentucky, has been expressly held by the United States Supreme Court to be unconstitutional and illegal in the cases above cited.

132

The concrete question in this case, therefore, may be concisely stated to be, whether or not tangible personal property, of which the Federal Government once had the primary custody and control, to secure its Internal Revenue Tax amounting to fully 80 per cent. of its cost, which possession and tax it has duly renounced and relinquished for the purpose of exportation to a foreign country, and which property has actually been exported to and stored in the Empire of Germany, can thereafter be taxed in the State of Kentucky, either directly or indirectly, by taxing the German storage receipts therefor, held by a citizen of Kentucky.

We say that it can not be thus taxed without a violation of the fundamental and organic laws of both the Federal and State govern-

ments. The storage receipts are not property. They are
133 merely evidences of title to the tangible property stored in Germany. Both the title to the property and the title to the storage receipts were merged in and held by a single proprietary owner at the dates of the attempted assessments. There has been no severance of title.

The case wholly differs from financial obligations, such as bonds or notes, where there are different proprietary owners. There is no analogy between such property and these storage receipts.

This proprietary owner could not sell to himself, nor buy from himself. These storage receipts were non-negotiable and merely documentary evidences of title. They were only taken as evidences of title and for purposes of identification and insurance of the goods so stored. The title to the property and the receipts held by the same person can not be divorced or separated. The receipts are not intangible assets, but evidences of the existence of tangible and physical property.

134 This court, in the case of Ferguson *v.* Northern Bank of Kentucky, 14 Bush., 569, had this character of receipts under consideration when it said:

"Where a party deposits his grain for storage merely, and it is mingled with other wheat, it is evident he has never parted with his title, and we can not see that the inquiry in such a case is pertinent to an issue like this. All the requisites constituting a sale are wanting. No sale is made, and no right has passed, except the mere right to store the owner's wheat."

The German warehouseman did not sell this whiskey to the appellee. The storage of the whiskey by them did not change appellee's title. The execution and delivery of the storage receipts did
135 not affect his title. The appellee, as owner of such receipts, was also the owner of the tangible property evidenced by such documents. The property is exempted from taxation by the Federal Constitution and laws. Since its exportation it has not been within the territorial boundary of Kentucky, nor subject to taxation anywhere within Kentucky, or anywhere within the United States of America.

Even under the Kentucky Negotiable Warehouse Receipt law it is not taxable where the title to foreign located tangible property and the storage receipts therefor are held by the same person. This court has repeatedly decided, under our Negotiable Warehouse Receipt Statute, that such warehouse receipts when executed in Kentucky are merely symbolic, or evidences of title; that the owners of such warehouse receipts are merely in the constructive but not in the actual possession of the goods therein described, and that unless the
136 owner has divorced himself fr the title to his stored goods there is but one unit of title. ...e

Newcomb Buchanan & Co. *v.* Cabell, 10 Bush, 460,
Greenbaum *v.* Megibben, *Ib.* 419, and
Cochran *v.* Ripy, 13 Bush, 495, and
First National Bank *v.* Boyce, 78 Ky. 55.

So it is that the present opinion of this court manifestly makes the evidences of title taxable regardless of the foreign location of the tangible property described therein, which is forbidden by every principle of law.

An entirely different principle applies to the taxation of bonds or notes, or other promissory obligations for the payment of money. There is no analogy between the two. All moneyed obligations are taxable, because they are, of themselves, intangible property. If, however, such promissory moneyed obligations are held by
137 the persons issuing the same against themselves, and not by a third party, they are neither property nor legal obligations, but valueless paper.

For illustration, suppose the law firm of Smith & Jones stored their law books in the Louisville Public Warehouse, or in any other warehouse of Kentucky; the title to the said books would still belong to the said firm. When they deposited them with such warehouse for storage for their own protection they took a storage receipt for the purposes of identification and insurance. They lived in Kentucky. Can they be taxed on the said stored goods and also on the storage receipt too?

Applying this assumption to the case at bar, can the appellee, Max Selliger, assume that he had stored his whiskey in a Kentucky warehouse, be taxed on the whiskey and also on his storage receipt evidencing his title thereto too? Can Max Selliger issue and
138 own an obligation against himself and be taxable on such an obligation, and also on the property represented by such obligation?

We have shown that the Kentucky Statute, as construed by this court, localizes bonded whiskey just like it localizes real estate or other tangible property actually situated within its boundary. The holders of bonded warehouse receipts, wherever they may reside, like the holders of real estate, wherever they may reside, are taxable if either the bonded whiskey or the real estate be located within the territorial boundary of Kentucky at the dates of assessment. Warehouse receipts are issued against whiskey in bond. The holders of these warehouse receipts reside in foreign States, or even in foreign countries, but they are required, through the distiller or warehouseman, to pay taxes in Kentucky on such whiskey so long as the same is localized in bonded warehouses, and until the Federal taxes thereon shall have been paid.

139 Does not this analogy apply equally to the case at bar? Is not Max Selliger the confessed owner of this whiskey located in the Empire of Germany? Does he hold anything more than storage receipts for this whiskey evidencing his title to it in the German warehouses? If taxed in Germany on this whiskey, and also taxed in Kentucky on the storage receipts, is it not obviously double taxation, and, as such, forbidden by the law?

In any aspect in which we can view the case, we think that the present opinion of this court is manifestly erroneous.

Section 4033, Kentucky Statutes, provides:

"Whenever the * * * bailee or person in possession of any

personal property shall pay the tax thereon which the owner ought to pay, the person paying the tax shall be entitled to recover
140 of the owner the amount of the tax so paid, and interest, which shall constitute a lien on the property upon which such tax was paid."

Again, by Section 4023:

"The holder of the legal title and the holder of the equitable title and the claimant or bailee in possession of the property on the 15th of September of the year the assessment is made, shall be liable for taxes thereon, and as between themselves it shall be the duty of the holder of the equitable title to list the property and pay the taxes thereon, whether the property be in possession or not at the time of the payment."

Let us suppose that this whiskey of Selliger's, during all the time it has been in Germany, had been in warehouses in Kentucky,
141 and Selliger had held the warehouse receipts as a Kentucky warehouseman. This warehouseman would have been bound to give in the whiskey for taxation. He would have been bound to pay the taxes thereon, but Selliger would have been bound to repay him the taxes he had thus paid. If Selliger were required to pay the tax on the warehouse receipts he would simply be paying taxes twice on the same thing. If Selliger, holding the warehouse receipts, had lived in New York, the whiskey being in a warehouse in Kentucky, the warehouseman would still have been compelled to pay the tax, and could still have recovered it from Selliger. This is because Selliger would, under the case supposed, own the whiskey, and the whiskey being taxable in the territorial jurisdiction where it was actually situated, the owner would be compelled to pay these taxes wherever he was, the person in possession giving in the property and the owner of the property being liable to the person in pos-
142 session, and the person in possession having a lien to secure this repayment to him.

Exactly the same thing would follow if one held a bill of lading or any other of the various documents of title of which we have above given a list.

A note secured by mortgage is an entirely different thing. Here the debt is due to one person; the property which secures the debt is owned by another person. The owner of the note is taxed on the note. The owner of the property is taxed on the property.

We respectfully submit that the analogy between the ownership of the deed and the ownership of the land called for by the deed, and the ownership of the warehouse receipt and the consequent ownership of the goods represented by the warehouse receipt, is a perfect one; that the two things are similar in all respects, the only difference being that the warehouse receipt indicates that the pos-
143 session and the title of the property have become severed. This, however, is treated by our statute as not being material. It is not treated as authorizing the taxation of the property in the hands of its possessor and of the same property as against the holder of a document which shows that the custody of the possessor is in trust for the holder of the document. To the contrary, the statute

contemplates only one tax but seeks to make that one tax finally rest upon the person who has the real title to the property.

Summary.

1. We respectfully submit that this court has not answered our argument to the effect that a Kentucky taxation of this exported whiskey, located in Germany, and having its actual situs foreign to the United States, would be to give the laws of Kentucky an extra-territorial operation, which would be both in conflict with
144 Section 10 of Article 1, and with Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. We submit that the present opinion of this court is in direct conflict with the following decisions of the United States Supreme Court, to wit:

Brown *v.* Maryland, 12 Wheat. 419.
Low *v.* Austin, 13 Wall. 29.
Norfolk Ry. Co. *v.* Sims, 191 U. S. 449.
American Steel Co. *v.* Speed, 192 U. S. 519.
Brown *v.* Houston, 114 U. S. 628.
May *v.* New Orleans, 178 U. S. 496.
Austin *v.* Tennessee, 179 U. S. 343.
Almy *v.* California, 24 How. 169.
Fairbanks *v.* U. S. 181 U. S. 283.
Pittsburg Coal Co. *v.* Bates. 156 U. S. 587, and
Clark *v.* Clark, 3 Woods, 411, as well as
145 Union Refrigerator Co. *v.* Kentucky, 199 U. S. 194.
Delaware R. R. Co. *v.* Pennsylvania, 198 U. S. 341.
Ferry Co. *v.* Kentucky, 188 U. S. 385, and
Tie Co. *v.* Kentucky, 202 U. S. 409.

3. As we interpret the opinion of this court, it holds that the appellee was liable to taxation upon his whiskey in Germany, and at the same time in Kentucky, without regard to whether said whiskey, on any of the dates of assessment, was actually located within the State of Kentucky, and in spite of the admitted fact that during the whole of the said period the said whiskies were actually located in Germany and outside of the State of Kentucky and of the United States as bonded exported whiskey on which no Federal internal revenue tax had been paid.

146 In reaching this conclusion this court undertook to differentiate the actual situs of the whiskey and the domicile of the holder of the storage receipts therefor, and hold that while both the title and the holder of the said receipts were merged into one and the same person, this person was liable for taxation in Germany on the actual whiskey, and also in Kentucky on the storage receipts evidencing his title, which we assert to be fundamentally erroneous.

If this court shall, in spite of this petition, be still of the opinion that such a system of double taxation is legal, and as we desire to prosecute a writ of error to the Supreme Court of the United States, it would seem to us that time would be gained by this court making a specific direction as to the judgment to be entered by the lower

court without forcing us to go through the circumlocution of going back and coming to it again to obtain a final reviewable judgment.

147 It appears, uncontradicted from the evidence, that, at none of the periods of assessment described in this record, was such age and quality of whiskey assessed by the proper assessing authorities at more than $8.00 per barrel. We quote from the evidence of Mr. Selliger, taken by appellant, on page 50 of the record, as follows:

"122. Mr. Selliger, will you tell the court what is the uniform rate at which the State Board of Valuation has assessed these whiskies which were reimported to this country?

A. For the last three years the valuation was $7.00 and $8.00 per barrel, and the two years previous to that it was $7.00 per barrel.

123. Is that the rate that is fixed uniformly by the State during those periods on these whiskies?

A. It is the rate fixed on all whiskies irrespective of their age or brand." (R. 50.)

148 If this court should decide to adhere to its first opinion, we ask it to make its judgment final and direct such assessment of these whiskies, or of the storage receipts representing the same, so that without any circumlocution and without further delay the validity of this assessment may be finally tested by the Supreme Court.

Distilled spirits in bonded warehouses are taxed in Kentucky under a system peculiar to that class of property.

Sections 4105 to 4114, Kentucky Statutes, set out in full what is this method. It was held to be unique but constitutional, in Commonwealth of Kentucky *v.* E. H. Taylor, Jr. Company, 101 Ky. 326; and it was further held, in City of Louisville *v.* Louisville Public Warehouse Company, 107 Ky. 184, that it must be followed in order to reach, for taxation, that class of property.

149 In brief, the State Board of Valuation and Assessment determines the value for taxation of all the distilled spirits in the bonded warehouses of this Commonwealth, fixing each year what is this value per barrel, which is binding on all subordinate subdivisions of the State (Sec. 4108).

Where the State Board of Valuation has certified as against the owner of distilled spirits in a warehouse this value it is conclusive, and a revenue agent can not in any proceeding challenge it. Commonwealth of Kentucky *v.* E. H. Taylor, Jr., 101 Ky. 327.

If, therefore, the distilled spirits belonging to Selliger had been in a bonded warehouse in Kentucky during the several years when, in fact, they were in a bonded warehouse in Germany, they must have been valued according to the determination of the State Board of Valuation and Assessment. We do not mean to assert that if the

150 owner of a distillery bonded warehouse fails to report to the Auditor the number of barrels in his distillery bonded warehouse, a proceeding can not be taken against him by a revenue agent for the listing of these distilled spirits; but what we do insist is that in any such proceeding, after the quantity of such distilled spirits has been disclosed, the valuation fixed by the State Board of

Valuation and Assessment on this property must govern the County Judge and subordinate taxing authorities. In other words, it would certainly be most unequal and unjust taxation when the State Board of Valuation and Assessment had fixed the value of all distilled spirits in the Commonwealth at a certain sum per barrel, to have any of such distilled spirits assessed at a greater amount per barrel.

If, therefore, the court should adhere to its opinion that these warehouse receipts are property, in and of themselves, and are
151 not, as we believe we have shown, mere *indicia* of title, then surely they could not be taxed at a valuation greater than the property which they represent would be taxed if it were actually within the taxable jurisdiction of the Commonwealth.

We find that this court followed this exact method of procedure in the case of Commonwealth *v.* Union Refrigerator Company, 118 Ky., at page 144.

4. We presume that this court did not intend that the lower court should tax these storage receipts further back than five years before the institution of this proceeding against the appellee, or, in other words, that this court intended to confine its ruling to the case presented by the appellant so far as the same was not barred by the five year limitation pleaded by appellee.

5. We, therefore, respectfully ask for a rehearing of this case, and that the judgment of the lower court shall be affirmed, or,
152 failing in that request, we ask that this Court shall modify its opinion or mandate and specifically adjudge that the appellee shall not be held liable on his storage receipts except to assessments for the period of five years before the institution of this proceeding, and will further specifically direct the lower court to enter judgment on a valuation of $8.00 per barrel of the whiskey admitted to have been located in Germany on which such storage receipts were issued to and held by him as of the dates of the assessments set forth in the appellant's statement.

Respectfully submitted.

DODD & DODD,
HUMPHREY & HUMPHREY,
Attorneys for Max Selliger, Sole Appellee and Sole Owner of the Whiskey and Storage Receipts.

153 And afterwards on the 6th day of February 1907 at a Court of Appeals held at the Capitol at Frankfort, the following order was entered to-wit:

COMMONWEALTH, ETC.,
v.
SELLIGER, ETC.

Jefferson.

The Court being sufficiently advised, appellees' motion for an oral argument on petition for rehearing is sustained, and said case is set for oral argument on March 12th, 1907.

And afterwards at a Court of Appeals held at the Capitol at Frankfort, on the 8th day of March, 1907, the following order was entered, to-wit:

COMMONWEALTH, ETC.,
v.
SELLIGER, ETC.

Jefferson.

Came the parties by counsel and filed an agreement, and on motion the order setting this case for oral argument at the present term is now set aside, and said case is continued for oral argument to the April term.

And afterwards at a Court of Appeals held at the Capitol at Frankfort on the 15th day of May, 1907, the following order was
154 entered to-wit:

COMMONWEALTH, ETC.,
v.
SELLIGER, ETC.

Jefferson.

Came the appellant by counsel and filed a reply to the petition for rehearing, and said case coming on to be heard was argued by M. J. Holt, for the appellant, and A. P. Humphrey for the appellee, and submitted.

(The reply to the petition for rehearing mentioned in the above order is as follows:

155 Court of Appeals of Kentucky.

COMMONWEALTH OF KENTUCKY, by GEORGE H. ALEXANDER,
Revenue Agent for the State at Large, Appellant,
vs.
MAX SELLIGER, &C., Appellees.

Response to Petition for Rehearing.

The sole question involved in this case is whether or not the following property of appellees, viz, whiskey in Bremen and Hamburg, Germany, on the various assessment dates or the warehouse receipts held by appellees and representing same, was subject to an ad valorem tax by the State of Kentucky and Jefferson County for each of the following years:

1900 as of September 15, 1899..... 7005 barrels;
1901 as of September 15, 1900..... 6030 barrels;
1902 as of September 15, 1901..... 4250 barrels;
1903 as of September 15, 1902..... 2566 barrels;
156 1904 as of September 15, 1903..... 1611 barrels;
1905 as of September 1, 1904..... 1564 barrels.

It is admitted that the appellee during the above years was a resident of Jefferson county, Kentucky, in the wholesale liquor business, doing business under the trade name of Max Selliger & Company.

As controverting appellant's right to tax same, appellee claims that this whiskey was an export within the meaning of Art. 1, section 10; Sub; sec. 2. of the United States Constitution and the situs of the same was in Germany and not in this State and for these reasons the whiskey was not subject to assessment for taxation. The warehouse receipts are not property but are mere inditia of title, and for that reason are not property subject to assessment for taxation.

Points of Law.

I.

If this 8000 barrels of whiskey was exported temporarily,
157 or not for use, that is—to await a better market, or to evade for the time being, the revenue tax of 90c per gallon;—the situs of same for the purpose of taxation is in Kentucky, the place of residence of the owner.—In order to come within the exception or exemption of the Union Refrigerator Transit Company case it must be *permanently located* in another State *and in use in* that State.

111 Ky. 667, Board *vs.* Fidelity Trust etc.,
Union Refrigerator Tr. Co. case, 199 U. S. 194;
Depositions (Selliger) ques. 54-55-110-94-95-96.
Uri, 4-5 Thomas 10-12-13-14-15-16-17.

II.

If the whiskey by reason of the provision of the Federal Constitution is exempt as an export from a State and ad valorem tax, then the warehouse receipts as the intangible property of appellee are subject to assessment as omitted property. Warehouse receipts by common and civil law and by express statutory provision (Ky. Stat. section 4770) are negotiable and transferable.

158 Const. 172 Ky. Stat. section 4020;
78 Ky. 42, First National Bank *vs.* Boyce.
10 Bush, 468-469, Newcomb, Buchanan & Co. *vs.* Cabbell.
24 Ky. L. R. 653, Farney *vs.* Ethridge.
10 Bush, 420, Greenbaum Bros. *vs.* Meggiber.
13 Bush, 505, Cochran &c. *vs.* Ripey.
26 Ky. L. R. Commonwealth *vs.* Union Ref. Tr. Co.
111 Ky. 667, Board of Council &c. *vs.* Fidelity Trust Co.
Appellee's Deposition—Questions 72, 73, 74, 75, 83, 84, 96.

III.

Whiskey warehouse receipts are property in and of themselves and are not mere inditia of title. They are intangible property, the situs of which is at the domicile of the owner. This rule may be qualified where one person is the owner of both the whiskey and

the receipts, and both are located in the same jurisdiction. The sovereign may elect to tax the tangible property because it is the easiest found.

Purdy's Beach—Private Corporations, Secs. 271-272, 509*a*-350-510.
Farmer *vs.* Ethridge, 24 Ky. L. R. 653.
Cockaan &c. *vs.* Ripey, 13 Bush 505.
Board &c. *vs.* Fidelity Trust Co. 111 Ky. 677.
159 30 Am. & Eng. Ency. of Law, pages 69 to 77.
Field *vs.* Montmollin, 68 Ky. page 455—*81 Ky. 416.*
Spalding &c. *vs.* Payne &c.
Greenbaum *vs.* Burns, 13 Ky. L. R. 267;
Winslow *vs.* Fletcher, 52 Am. Rep. 122;
Wilkesbarre &c. *vs.* Wilkes Barre, 148 Pa. St. 601,
Neiler *vs.* Kelly, 69 Pa. St. 403;
Knox *vs.* Eden, 148 N. Y. 441;
Columbus &c. *vs.* Wright, 151 U. S. 470.

The provision of the Federal Constitution, Art. 1, sec. 10, Sub. sec. 2, "that no state shall lay any *impost* or *duties* on *imports* or *exports*" does not apply to the levy of an ad valorem tax on this whiskey as the property of appellee, because:

a. It is a tax levied upon the personal property of all citizens of this State, wherever situated;

b. This is not an impost or duty.

c. This whiskey has lost the character of an export; it is at its destination; the original shipment has been broken; two-thirds of it has been sold; the consignor and the consignee are one and the same,—and the residue is on the market for sale.

178 U. S. 501-509. May *vs.* New Orleans (Import case)
117 U. S. 506 to 507, Turpin *vs.* Burgess, (Export Case)
160 114 U. S. 519-520 American Steel Co. *vs.* Speed,
Depositions of Selliger, Questions 66-69-83-84-114-115-116.

This Court is asked to assess the warehouse receipts at a valuation as an equivalent of $8.00 per barrel on the whiskey. I take it this cannot be done except by consent. The Court cannot assume the province of an assessing board. The record, however, establishes (page 60) that the whiskey is worth $12.50 per barrel. The State Board of Valuation and Assessment may have assessed all whiskey listed in bonded warehouses at $8.00 per barrel—but that valuation is not conclusive upon the County Court as to this whiskey, which was not listed. The valuation by the State Board does not abrogate the Constitution which declares—"all property shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale."

161 The declaration of Petitioner that the valuation fixed by the State Board of Valuation and Assessment on whiskey in bonded warehouses "must govern the County Judge and subordinate taxing authorities" contravenes section 172 of the Constitution and Section 4241 of the Statutes, and is founded on as good law as other material declarations.

Argument.

Counsel for appellee base their petition for rehearing upon the fact that the court holds the warehouse receipts taxable when that proposition was not briefed by them. Appellant devoted pages 10 to 14 inclusive of the original brief to this subject. The grounds of the motion for a new trial made in the Circuit Court found on pages 64 and 65 of the record, recite—

First. That the judgment is contrary to the evidence in that the evidence clearly establishes that the whiskey sought to be subjected for taxation or the warehouse receipts had a situs in Ken-
162 tucky.

Second. That the judgment is contrary to the law in that the situs of the whiskey sought to be taxed and its constructive possession was in Kentucky. That the situs of the warehouse receipts was in Kentucky because same were negotiable instruments and the constructive possession of said whiskey and the situs of same are at the domicile of the owner of the warehouse receipts.

Pages 43, 44, 45, 46 and 47 of the Record containing appellee's testimony is devoted to an interrogation, seeking to establish this issue.

I am forced to disagree with that portion of the opinion of the Court which decides that the situs of the whiskey for taxation is in Germany, and that the motive of the exporter could never be safely inquired into. There is but one reason why tangible per-
163 sonal property in a foreign jurisdiction cannot be assessed under the provisions of our Constitution and Statutes and that is because it is permanently located in another jurisdiction and *employed* there as local property. The motive for the exportation can be inquired into, but the proof assailing the exportation that it is not for a permanent purpose, as any other allegation charging fraud will have to establish the fact beyond a reasonable doubt or by a decided preponderance of the evidence. (See Turpin *vs.* Burgess, 117 U. S. 506-7.)

Unless the whiskey is exempted by Art. 1, section 10, sub-sec. 2 of the Federal Constitution, or by reason of its situs in law, being in Germany; for the purpose of taxation it should be assessed as omitted property by the State of Kentucky and Jefferson County because the defendant is a resident of Kentucky. The State Constitution (section 172) and Kentucky Statutes (4020) provide: "all personal estate of persons residing in this State whether the
164 property be in or out of this State shall be assessed at its fair cash value."

The Court of Appeals in Commonwealth *v.* Union Refrigerator Transit Company (26 L. R. 23) declared under a strict construction of the provision of the Constitution and the Statute above referred to, that all personal estate of persons residing in this State, shall be assessed by this State. This rule was in a great measure, qualified by the decision of the United States Supreme Court upon appeal by the Union Refrigerator Transit Company. In that case the rule adopted is "that tangible personal property *permanently*

located in another State and *employed there* in the prosecution of its business," cannot be taxed by the State of Kentucky as being in violation of the due process of law clause of the Fourteenth Amendment.

The exemption of tangible property from taxation located in another State is because the property is permanently located in other States and is employed there in the prosecution of its business. This *location* and *employment* fix the situs for taxation.

165

In no sense was this whiskey permanently located in Germany. Appellee Selliger in his testimony says:

"Moore & Selliger during 1891, 1892 and 1893 (tight money years) exported 18,000 barrels of whiskey to Bremen and Hamburg. (p. 35). The cost of exportation was $2.50 per barrel. (p. 51). If it had not been exported, as the bonded period had expired, it would have been necessary to pay the Revenue tax of 90 cents per gallon (p. 45) amounting to $36.00 per barrel or a total of $648,000—a sum hard to raise at the time. This was the sole cause of exportation because there was no demand in Germany or elsewhere for the product.

One-third of this whiskey was brought back to Kentucky and sold here. (p. 39-40-44.) It all remained in the State the full bonded period (p. 41) and was exported as Selliger declares, because it was more profitable to send it abroad that to *tax pay* it and keep it here.

166

Major Thomas who has been in the wholesale whiskey business in Louisville since February, 1870, and who is probably known to a majority of this Court, testifying for plaintiff (pages 56 to 60) states that he exported from ten to fifteen thousand barrels about the time appellee exported his whiskey and there were from two hundred and fifty to three hundred thousand barrels exported from the State. The reason of the exportation was because of the tightness of the money market; there was no money to pay the tax at the expiration of the bonded period, and the vast over-production with no market. It was shipped to Germany although there was no demand or sale for it there or elsewhere.

It was not the intention of the appellee when he exported it to have it remain in Germany but to re-import it to the State of Kentucky, when the market might justify such importation. It seems to me absurd to contend that whiskey in a warehouse placed there merely for the purpose of awaiting a better market and for a time to evade the payment of the revenue tax, can be considered as *in use* at its *place of location*. The Supreme Court decision emphasizes the grounds of reversal as being upon the issue of location and employment in another State and no other ground or reason is given for the reversal of the Union Refrigerator Transit Company case.

167

The following pertinent language is used in that decision:—

"In that case the question is directly presented whether a corporation organized under the laws of Kentucky is subject to taxation upon its tangible personal property *permanently located* in other states, and *employed there* in the prosecution of its business. Such

taxation is charged to be a violation of the due process of law clause of the 14th Amendment." * * *

168 "The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an *equivalent rendered* to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares,—such, for instance, as roads, bridges, sidewalks, pavements and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property *be wholly* within the taxing power of another state, to which it may be said to owe an allegiance, and to which it looks for protection, the taxation of such property within the domicile of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this Court to be beyond the power of the legislature, and a taking of property without due process of law. * * *

169 "Subject to these individual exceptions the rule is that in classifying property for taxation, some benefit to the property taxed is a controlling consideration and a plain abuse of this power will sometimes justify a judicial interference." * * *

"The arguments in favor of the taxation of intangible property at the domicile of the owner have no application to tangible property. The fact that such property is visible, easily found, and difficult to conceal, and the tax readily collectible, is so cogent an argument for its taxation at its situs, that of late there is a general consensus of opinion that it is taxable in the State where it is *permanently located* and *employed*, and where it receives *its entire* protection, irrespective of the domicile of the owner. We have ourselves, held in a number of cases that such property, permanently located in a state other than that of its owner is taxable there." * * *

170 and that the maxim *mobilia sequuntur personam* may only be resorted to when *convenience and justice* so requires. The proper use of legal fiction is to prevent injustice, according to the maxim *"in fictione juris semper æquitas existit."* * * *

"In Com. *v.* American Dredging Co. 122 Pa. 386, 1 L. R. A. 237, 2 Inters. Com. Rep. 221, 9 A. St. Rep. 116, 15 Atl. 443, it was held that a Pennsylvania corporation was taxable in respect to certain dredges and other similar vessels which were built, but not permanently retained outside of the State. It was said that the nontaxability of tangible personal property located permanently outside of the State was not "because of the technical principle that the situs of personal property is where the domicile of the owner is found. This rule is doubtless true as to intangible property, such as bonds, mortgages and other evidences of debt. But the better opinion seems to be that it does not hold in the case of visible tangible personal property permanently located in another State. In

171 such cases it is taxable within the jurisdiction where found, and is exempt at the domicile of the owner." The property in that case, however, was held not to be *permanently* outside of the State, and therefore not exempt from taxation. The rule however,

seems to be well settled in Pennsylvania, that so much of the tangible property of a corporation as is situated in another State, and there employed in its corporate business, is not taxable in Pennsylvania."

It is to be noted that all of the while this whiskey was in Germany, the appellee held the warehouse receipts for same and these warehouse receipts received the benefit and protection of the Kentucky law; were made negotiable and transferable by express statutory provisions and by reason thereof the defendant was able to borrow as much as eighty thousand dollars upon this whiskey in a foreign warehouse. The power of taxation as a general rule is exer-
172 cised upon the assessment of an equivalent rendered to the tax-payer in the protection of his personal property, in adding to the value of such property or in the creation and maintenance of public conveniences in which he shares. This whiskey was not wholly within the taxing power of another State. By reason of the warehouse receipts by which the sale of the whiskey was made it had protection and shared in the benefits of the laws of the State, at the domicile of the owner.

The case of Commonwealth *v.* American Dredging Company, 122 Pennsylvania, 386, which was decided under a statute not near so explicit as the Kentucky statute, where dredges and similar vessels were outside the State of Pennsylvania upon the taxing dates, and in use beyond the limits of the State, but not permanently retained outside the State were held not exempt from taxation by that State. Although as said in the Union Refrigerator Transit Company case the rule in Pennsylvania seems to be well settled that tangible property of a corporation in another State and permanently em-
173 ployed there in its corporation business, is not taxable in Pennsylvania.

The case of Delaware L. & W. Rd. Co. *v.* Pennsylvania (198 U. S. 341) did not involve the question of the right to tax tangible property by reason of its situs in another State. The question involved in that case was the right to assess as a portion of the capital stock of the Railroad Company coal in the State of New York sent there for sale in that State.

An examination of the testimony of the defendant in this case is enough to show that this whiskey was exported temporarily and not for use but for the purpose of awaiting a better market. The testimony also shows that one-third of this whiskey (Question 116) was re-imported to Kentucky and all of it was sold by warehouse receipts held by the defendant.

Our Constitution declares—All property owned by persons in this State shall be taxed—If a warehouse receipt is property—It is intangible property—its situs is at the domicile of the owner
174 and it is subject to taxation by the State of Kentucky—If it is intangible property, the laws of Germany have as much to do with its situs for taxation as the latest edict of the Sultan of Turkey, if it is mere evidence of title and is to be treated as a deed, this case is concluded. (See Purdy's Beech on Corporations, section 350, 272 and 509a, as to taxable situs.)

The purpose of a warehouse receipt is to transfer by symbolical delivery—where the goods might be ponderous—or at a distance. In

this respect it partakes of a bill of sale of a ship at sea, or a bill of lading of a cargo, or of a deed in the transfer of the title. The delivery of a whiskey warehouse receipt to a purchaser, carried with it an encumbered title to the property symbolically delivered. The revenue tax amounted to 3/4 of the value of the product, and before actual delivery this tax had to be paid. Thus the purchaser became the owner of the whiskey in constructive possession by the payment of 1/4 the sum it would be necessary to pay for an actual delivery of the whiskey.

175 This feature alone gives to a warehouse receipt a property value—amounting to more than mere evidence of title. It is the prime cause for making it negotiable throughout the commercal world.

Our learned friend—is bound to know that the laws governing commercial transactions are practically uniform throughout the civilized world. The civil law—the law merchant, the common law as modified by Statute with practical unanimity makes all paper in general use in commercial transactions and transferable by delivery, negotiable. Our statutes, section 4770, make warehouse receipts negotiable, I know that by express statute and decision they are negotiable in England—Alabama, Arkansas, California, Colorado, Connecticut, Georgia, Illinois, Indiana, Kentucky, Massachusetts, Mississippi, Misouri, New York, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Vermont, Virginia and Wisconsin. (Am. & Eng. Ency. of Law, page 71.) All negotiable instruments are property. All have a taxable situs which is the domicile of the owner,

176 unless otherwise expressly declared.

They are property—their situs is in Kentucky—Our Constitution—every presumption of the general law and our Statutes declare them taxable.

I submit as a proposition of law borne out by the authorities of this and other States, "that if this whiskey by reason of the provision of the Federal Constitution is exempt as an export from a State ad valorem tax or if this whiskey by reason of its situs is exempt from taxation from such tax, then the State of Kentucky is justified in taxing the warehouse receipts as the intangible property of the appellee." They are as much property as a note or any chose in action. This whiskey was sold from the State of Kentucky by the defendant and by the warehouse receipt. The contract for the sale of this whiskey was entered in to in the State of Kentucky, is to be construed by the laws of this State, and all the evidence of sale and the only way a sale could be made was by a transfer of the warehouse re-

177 ceipt.

The following cases are directly in point upon this issue and it seems settle the right of the Commonwealth to tax the whiskey or the warehouse receipts.

In the case of Farmer *v.* Ethridge, 24 Ky. L. R. 653, the Court says:

"Such receipts when issued by the warehouseman are negotiable at common law and are put upon the footing of bills of exchange, with like remedies thereon by the Statute. As said by this Court in Cochran & Fulton *v.* Ripley & Hardie, etc. 76 Ky., 495: 'The act

was designed to advance commercial interests of the State, in affording facilities for making sale of personal property in a warehouse without actual delivery and to enable the owners by transfer of the warehouse receipts to pledge the property for the advance of money or the payment of debts.'

And there is nothing in the Statute which limits their ne-
178 gotiable character to transactions had in this State with citizens thereof and such a construction would be at variance with the intention of the Statute. Besides, the tobacco was stored in this State, and the contract was to be performed in this State, and it is a well-settled rule of law that the law of the place where the contract is to be performed is the law which must govern its construction."

In the case of Cochran, etc. *vs.* Ripley, 13 Bush, 505, the Court says:

"These receipts or vouchers have some of the characteristics of commercial paper. No one can obtain the property but the holder of their receipt, unless he produces the written consent of the holder as well as the receipt itself. They are negotiable and transferable by blank indorsement, the indorsers being liable as indorsers of bills of exchange; and as to the property owned by the warehouse-
179 man, and for which he gives his receipt, he can assert no claim or setoff as against the holder, unless the receipt on its face shows such right to exist. The act was designed to advance the commercial interests of the State in affording facilities for making sales of personal property in warehouses, without an actual delivery, and to enable the owners, by the transfer of warehouse receipts to pledge the property for the advance of money or the payment of debts."

These decisions are all based upon not only the common law but express statutory provision in the State of Kentucky making them negotiable and transferable. The contract of sale as shown by the proof, was made in this State, the transfer of the warehouse receipts was made in this State, and therefore such sales are governed by the laws of this State.

The case of Board of Council etc. *vs.* Fidelity Trust Company, 111 Ky. 677, seems also in point upon this proposition:

180 "The mortgagor before foreclosure, is the owner of the property, and his interest is real estate, to be conveyed, attached, taxed, and inherited as such, while the interest of the mortgagee is mere personal estate, and the mortgage has no existence independent of the thing secured by it and the payment of the debt discharges the mortgage. * * * A mortgage in the hands of the mortgagee is liable to be taxed at the domicile of the creditor; and tax on money at interest secured by a mortgage on land is a tax neither on the coin the land on which the security is taken, nor upon the paper on which the promise is written, but on the chose in action or right to collect the debt."

"Undoubtedly the general rule both in this State and elsewhere is that the situs of personal property is presumed for purposes of taxation to be that of the domicile of the owner. Com. *v.* Hays, 8 B. Mon. 1: Thomas *v.* Mason County Court, 4 Bush, 135. This pre-

sumption is however overcome by certain exceptional conditions, as illustrated in the foregoing cases, and has been regulated in
181 many of the States by statutory provision. There is no contention that the Legislature in this State has enacted any statute changing this well-recognized rule that for purposes of taxation mortgaged real estate is taxed to the mortgagor, and the credit secured by the mortgage is treated as personal property *like any other chose* in action, and taxed to the creditor at his domicile. Cooley, Tax'n. 63; Eells *v.* Holden, (c/c/) 2 McCrary, 622 (12 Fed. 668) Grant *v.* Jones, 39 Ohio, St. 514, City and County of San Francisco, *v.* Mackey, (c/c/) 22 Fed. 602, People *v.* Smith, 88 N. Y. 577, Com. *v.* Chesapeake & O. R. R. Co.; 27 Grat. 344; and until the Legislature has by a Statute given a situs to mortgages owned by non-residents as property within the State, there is no occasion for the Courts to depart from the long-recognized rule in this State to tax mortgaged real estate to the mortgagor and the mortgage itself, when owned and controlled by a non-resident of the State, as personal property to be taxed like other choses in action, at the domicile of the creditor."

182 In the case of Newcomb, Buchanan & Company *v.* Cabell, 10 Bush, 468-469 the Court says:

"In Parsons on Contracts, page 435, it is said: "All that is essential to the sale of a chattel at common law is the agreement of the parties that the property in the subject matter should pass from the vendor to the vendee for a consideration given or promised to be given by the vendee."

The evidence in this case shows that neither of the parties to the contract were looking to the delivery of the whiskey in Louisville or its measurement as essential to passing the title to appellants, or as restricting the right of the latter to dispose of the whiskey as they might deem best for their own interests. The greater portion of the purchase price had not only been paid but the possession of the whiskey delivered to appellants. There was no manual delivery at the date of the contract, for the reason that it was in a bonded warehouse, under the control and in the actual possession of an
183 internal revenue officer, with the right on his part as an officer of the government to retain the possession until the tax due upon it was paid. It is true the parties might have gone from Louisville to Green County and released the whiskey by paying the tax, but while this may be so, it did not prevent the vendor from delivering to Newcomb, Buchanan & Co., the warehouse receipts that not only *passed the title* to the whiskey, but also *gave* to them the constructive *possession*. The delivery of these receipts by Hartfield to Appellants placed them in the same condition with reference to the possession and ownership of the whiskey that Hartfield was in prior to that time. He had no right to enter the warehouse or take manual possession of the whiskey, although his own property, without the consent of the officer having it in custody and the payment of the taxes, and when his receipts were passed to appellants they acquired the same right of property and possession. These receipts were the written evidence of Hartfield's title, and represented the

whiskey that was sold, the numbers in the receipts corresponding
184 with the numbers on the barrels, and their delivery was a surrender of the possession by Hartfield, and an acceptance of it by Newcomb, Buchanan & Co.

"The *delivery* of *warehouse receipts* is a *symbolic delivery* of the property itself; it has the same effect as the delivery of the property, and a transfer of the warehouse receipts by the person in possession has the same effect and force as transfer of property by the same person". (Burton *v.* Duryear, 40 Ill. 325.)

In the case of Gibson *v.* Stevens, (8 How. 400) where the vendee of pork and flour held under a warehouse receipt against an attaching creditor, the Court adjudged that "it transferred to the vendee the legal title and constructive possession of the property, and the warehouseman from the time of the transfer became his bailee. The delivery of the evidence of title was equivalent in the then situation of the property to a delivery of the property itself, and it sufficiently manifests the intention of the parties that the title and possession should pass.

In How *v.* Barker (8 California, 614) it was held that the
185 delivery of a warehouse receipt without assignment is sufficient *prima facie* to pass title. Upon principle, reason and convenience it is difficult to draw any substantial difference between a bill of lading and a warehouse receipt".

"A receipt given by a warehouseman for property placed in his possession for storage is not in a technical sense like a bill of exchange or negotiable instrument, but it merely stands in the place of property it represents, and the delivery of the receipt has the same effect in transferring the title to the property as the delivery of the property." (National Bank *v.* Walbridge, 19 Ohio State Reports).

By an act of the Legislature of this State, approved March 6, 1869, "all receipts issued by the warehouseman as provided by the act shall be negotiable and transferable by the indorsement in blank or by special indorsement and with like liability as bills of exchange now are, and with like remedy thereon."

Transferring the receipt may operate as a pledge or con-
186 structive delivery of the goods and gives such special property as will entitle the holder to recover possession. (Blydenstein *vs.* New York &c., 67 Fed. Rep. 469—Swedish American Bank *vs.* Garden &c., 89 Minn. 98). A warehouse receipt, stocks, bonds and notes can be used as *collateral security* and "a person to whom a warehouse receipt has been transferred by indorsement and delivery as *collateral* security is vested with a qualified title which gives him the right to take possession of the property upon the surrender and cancellation of the receipt." (Driggs *vs.* Dean, 167 N. Y. 121).

Like negotiable paper, similar intangible property—"the passing of a warehouse receipt into the hands of an innocent holder for value, prior to notice of an adverse claim to the goods, constitutes the pledgee a *bona fide* purchaser, who acquires a good title although the pledgor was insolvent when the goods were purchased and failed to pay for them and although they were obtained from the owner by

fraud. (30 A. & E. Ency. of Law, page 70, citing Buffalo
187 City Bank *vs.* Eastern &c., 187 Pa. St. 30, Hoyt. *v.* Baker, 15 Abb. Pr. N. S. (N. Y.) 405, Barnard *vs.* Campbell, 58 N. Y. 73). The warehouseman is estopped to deny the title of his bailor or of a *bona fide* holder of the receipt. (Babcock *vs.* Peoples Saving Bank, 118 Ind. 212. He is estopped from denying recitals in the receipt (Dean *v.* Driggs, 137 N. Y. 274) 137 N. Y. 110, New York &c. *vs.* Waterhouse, 66 Am. St. Rep. 82. See also Am. & Eng. Ency. of Law, Vol. 30, pp. 69 to 77.)

All choses in action are uniformly recognized as intangible personal property subject to assessment for taxation. A chose in action is defined to mean a mere right of action to a personal chattel not in actual possession. Yerby *v.* Lynch, 3 Gratt (Va). 471. In Deale. Gary, 14 S. Car. 573 it was said that a chose in action embraces two ideas, first a visible tangible thing—second: the right to sue for and recover that thing. See also Hamilton County *vs.* State 115 Ind. 84; Field *vs.* Montmollin, 68 Ky. 455; Spalding *vs.* Paines' Admr. 81 Ky. 416.

188 Warehouse receipts are *Commercial paper* and pass by indorsement in the same manner as bills of exchange. Greenbaum *vs.* Burns, 13 Ky. L. R. 267.

A warehouse receipt is valid in the hands of an innocent purchaser for value without notice. Collins *vs.* Rosenham, 19 Ky. L. R. 1445.

The taxable situs of warehouse receipts, commercial paper and stock certificates are identical, based upon the same general reasons. A stock certificate is not the stock itself, but like the warehouse receipt, it is evidence of ownership and the owner's rights. Like warehouse receipts such certificates are muniments of title, but not the title itself, much less the real property. (Winslow *vs.* Fletcher, 53 Conn. 390; 52 Am. Rep. 122, Purdy's Beach Corporations, Sec. 271). The certificates or shares of stock are *personal property;* they are the evidence of the stockholder's interest in the capital stock. which may consist in whole or in part of real estate. Purdy's
189 &c. Sec. 271; Wilkes Barre &c. *vs.* Wilkes Barre, 148 Pa. St. 601.

Like the warehouse receipt, "the certificate itself is *property* and when withheld the owner may recover it by action of detinue or replevin, or may recover its value in an action of trover." Purdy's &c. section 271; Neiler *vs.* Kelly, 69 Pa. St. 403; Daggett *vs.* Davis, 53 Mich. 35. The certificate is a vested right. Kent *vs.* Quicksilver, &c. 78 N. Y. 159.

Certificates of stock though not negotiable in form are treated by business men as such property for practical purposes. They are sold in the market, they are transferred &c.

"On the other hand the New York Court of Appeals said that though not negotiable in form: 'Certificates of stock are treated by business men as property for all practical purposes. They are sold in the market, and they are transferred as collateral security for loans, and they are used in various ways as property. They pass by delivery from hand to hand, and they are subject to larceny'. (148

N. Y. 441). And the Federal Court said: 'It is a well known
190 fact that stock certificates frequently circulate in places far remote from the home of the corporation by which they were issued; that in all commercial centers they are commonly transferred from hand to hand like negotiable paper, and that they are hypothecated for temporary loans by a simple indorsement and delivery thereof, the latter being perhaps, the most common use to which such securities are put. In the great majority of cases when stock is merely pledged for a loan, no record of the transfer is made on the books of the corporation, and, in the judgment of laymen, the making of such a record seems to be a needless formality. The trend of modern decisions has been to encourage the free circulation of stock certificates, in the mode last indicated, on the theory that they are a valuable aid to commercial transactions, and that the public interest is best subserved by removing all restrictions against their circulation, and by placing them as nearly as possible on the plane of commercial paper'." (93 Fed. Rep. 603) * * *

"It is held that the *situs* of the *corporation* will deter-
191 mine the *situs* of the *stock* without regard to the location of the certificates for the purpose of giving jurisdiction for the attachment of the stock." (See sec. 509*a*) (That is legal—not taxable situs). Purdy's Beach, &c. sec. 272; Knox *vs.* Eden, 148 N. Y. 441; Masury *vs.* Arkansas &c. 93 Fed. Rep. 603.)

So the situs of the corporation will determine the situs of the stock without regard to the location of the certificate for the purpose of giving jurisdiction for the attachment of the stock. Young *vs.* South &c., 4 Am. St. Rep. 752. Purdy'e &c. sec. 272.

The situs for taxation of the certificates in this State is not at the domicile of the corporation, but at the place of residence of the stockholder. Purdy's Beach Corporations, Sec. 509*a;* Columbus &c. *vs.* Wright, 151 U. S. 470; Revere *vs.* Boston, 123 Mass. 375.

If appellee gains his contention, it naturally follows the next step by concerted action of professional tax-dodgers will be to
192 question the right to tax foreign stock certificates, because the corporation pays to the State of New Jersey that buxom, full-breasted mother of tramp corporations, a tax on the corporate property.

No matter if appellee was the sole owner of the whiskey, and the warehouse receipt, this State if it taxes the whiskey, does not tax these receipts. If it taxes the receipts it makes no attempt to tax the whiskey. Germany may tax the whiskey. Kentucky may tax either the whiskey or the receipts, or possibly both. As said in the case of Whitaker *vs.* Brooks, 90 Ky. 76: "His non-liability does not arise out of the fact that the property of the corporation in Ohio is taxed here. To also tax his stock here would not be double taxation, because to be such it must be twice taxed in the same jurisdiction. Each State is sover-ign and independent in this respect, and one State cannot, of course, exempt property from taxation in another." (See Purdy's Beach on Corp. Section 510.)

193 A mortgage on land exempt from taxation does not release the mortgage from taxation at the owner's domicile. State *vs.*

Lantz. 53 N. J. L. 578, shares of stock pledged as collateral, taxed to pledgor. See Ratterman *vs.* Ingalls, 48 Ohio State, 468—Sheriff's certificate of land sale taxed; Miller *vs.* Vollmer, 153 Ind. 26.

In 30 Ky. L. R. 452-3 it is said:—

"The warehouseman in Germany who issued warehouse receipts for the whiskey created a distinct property in the receipts. While in a sense they represented the whiskey, being its symbol for certain purposes, it could scarcely be maintained, for it is not true that they stand in lieu of the whiskey for all commercial purposes. Like all symbols, they are fictions; so are promissory notes, and bonds. Each is a representative or evidence of something else. Yet everywhere each has an individual value derivative, it is true, from the thing on which it is rested, yet is deemed distinct property. A bond is an evidence of the promise of its maker to pay its face at a
194 time ascertainable. Its original commercial value depends upon the value of the security supporting it—whether it be the solvency of its maker, his credit, or the hypothecation of collateral to insure its being redeemed. Its indorser may add to its original value as property by his solvency, and so forth. Yet as so much paper it is valueless, whether for taxation, or trade. It may rest for the security of its redemption upon real estate, or for that matter whiskey mortgaged while it derives its value as a commercial asset in part, or may be in whole, from the mortgaged property securing it, it is always and everywhere deemed property of the value which it may have in the market, and may be taxed although the property mortgaged to redeem it is beyond the taxing district, and may also be taxed where it is situated. A warehouse receipt partakes of some of the same features. Its original value may depend entirely on the value of the chattel it represents, and which is deemed to be in pledge to redeem it. But such receipts are generally negotiable as bonds and bills of exchange are. Each endorser
195 may add materially to their value. They float upon the markets of the world as property as surely as bonds are property. Whoever owns them owns that much of assets having such value as the market affords to them, which may be sold, hypothecated, attached for debt, and are the subject of inheritance. Like other *choses in action*, their situs is that of their owner. His security and comfort given to them by government enable him to hold and enjoy them."

It is true a warehouse receipt is a document of title created for the purpose of delivery by symbol. It is evidence of the holder's title, but it is more—while you convey real estate by the execution of a deed, and not by an indorsement of the original deed—the warehouse receipt is transferred by endorsement, the same as a note—it is property, the subject of larceny, and when withheld the owner may replevin—it is hypothecated in the same manner. It is a chose in action having more the property elements of a mort-
196 gage note, commercial paper, a stock certificate, or a bond, than of a deed, or a bill of lading, which are mere evidences of title. It is true these receipts are evidences of title, partaking of the property elements of *deeds* and *bills of lading*, transferring the

legal title and giving constructive possession of the tangible property.

So the bat may be the same color as the thursh; some bird with hair like plumage may resemble the bat; the bat skins through the air like a swallow, he may coo to his mate like the dove;—yet a Darwin in lieu of a Dodd, a Huxley in lieu of an Humphrey would have trouble in convincing skeptical humanity that a bat is a bird.

This Whiskey is not an Export.

The provision of the Federal Constitution Art. 1, Sec. 10, Sub. Sec. 2, "that no State shall lay any imposts or duties on imports or exports," does not apply to the levy of an ad valorem tax on this whiskey as property of the defendant because this is not an
197 impost or duty.

This is not an export and even if at one time an export has lost that character. It is at its destination. The original shipment is broken; two-thirds of it has been sold and the residue is on the market for sale. The *consignor* and the consignee are one and the same, the appellee. It is not in the original package within the meaning of the decisions, although it is in the same barrels. (The appellee was and is a wholesale liquor dealer and sells only by barrel quantities.)

The tax sought to be imposed is not a tax imposed by Kentucky upon the whiskey as a foreign product nor a tax imposed by reason of the whiskey being exported nor a tax while it is in a state of transit to some other place of destination. It is sought to be imposed upon the whiskey after its exportation, after it has reached its destination and it has become property in the market at its place of destination. It therefore enjoys no discriminating favors other than all tangible property of persons in this State situated beyond the limits of this State.

198 It is said in the case of Coe *vs.* Errol, (116 U. S. 517) and quoted in Turpin *vs.* Burgess, 117 U. S. 507:

"The prohibition has reference to the imposition of duties on goods by *reason* or *because of their exportation* or intended exportation or whilst they are being exported. That would be laying a tax or duty on exports or on articles exported within the meaning of the Constitution. But a *general tax* laid on *all property* alike and not levied on goods in course of exportation, is not within the constitutional prohibition. How can the officers of the United States or of the State know that goods apparently part of the general mass, and not in course of exportation, will ever be exported? Will the mere word of the owner that they are intended for exportation make them exports? This cannot for a moment be contended. It would not be true and would lead to the greatest fraud."

The cases of Brown *vs.* Turpin, 114 U. S. 632, 3-4, (an interstate case) Turpin *vs.* Burgess, 117 U. S. 506-507 (an export case)
199 and of May *vs.* New Orleans, 178 U. S. 504-508 and 509 (an import case) conclusively establish that this whiskey is not exempted from assessment for ad valorem taxes, as an export within the exceptions embraced by Art. 1, Sec. 10, Sub-section 2, of the Federal Constitution.

Still with the greatest degree of insistence, because the petition for rehearing and argument of counsel present no new argument, and demonstrate no violation of any established principle of substantive law, it is respectfully submitted that the Petition for Rehearing should be denied.

M. J. HOLT,
For Appellant.

B. F. WASHER,
Of Counsel.

200 And afterwards at a Court of Appeals held at the Capitol at Frankfort, on the 4th day of June, 1907, the following order was entered—

COMMONWEALTH, ETC.,
v.
SELLIGER, ETC.

Jefferson.

Came the appellee by counsel and filed a supplemental petition for rehearing.

The supplemental petition mentioned in the foregoing order is as follows:

201 Filed May 29, 1907. J. Morgan Chinn, C. C. A.

Court of Appeals of Kentucky.

COMMONWEALTH OF KENTUCKY, by GEORGE H. ALEXANDER, Revenue Agent, Appellant,
vs.
MAX SELLIGER, Appellee.

Supplemental Petition for Rehearing.

May it please the Court:

As representing different parties in the State who are the owners of whiskey located in this State, and the holders of warehouse receipts evidencing their title to the same, we ask leave to submit certain suggestions to the Court in regard to the opinion which had been delivered by the Court in this case. Officials whose duty
202 it is to collect taxes upon omitted property are using this opinion in an effort to cause to be assessed for taxation all warehouse receipts for whiskey, without regard to the location of the ownership of the whiskey at all. The language of the opinion upon which they especially rely in these proceedings is as follows:

"We are of the opinion and without hesitation hold that warehouse receipts wherever issued, and whatever they may represent *are* intangible personal property whose situs for the purpose of taxation is the domicile of their owner."

Under this language the back-tax officials are contending that the warehouse receipts are taxable even if the whiskey itself is still located in Kentucky, and tax thereon is paid for the period in question according to the method provided by the Kentucky Statute.

The learned counsel for the appellee herein have presented such an able argument in their petition for rehearing as to com-
203 pletely cover every point in the case. However, as to the peculiar phase of the question in which our clients, as owners of whiskey in Kentucky, are interested, we will ask their leave to repeat here such portions of the Petition for Rehearing as, in our opinion, absolutely demonstrates the conclusions which we desire to reach.

The portions of the petition which we desire to cite are as follows:

"The effect of the opinion of this court, in the case at bar, is to impose double taxation on a single unit and title owned exclusively by the appellee. It cannot be denied that the whiskey represented by the storage receipts held by appellee, is tangible property, and that the sole title thereto belonged to the appellee."

"So it is that the present opinion of this court manifestly makes the evidence of title taxable regardless of the foreign location
204 of the tangible property described therein, which is forbidden by every principle of law."

"For illustration, suppose the law firm of Smith & Jones stored their law books in the Louisville Public Warehouse, or in any other warehouse of Kentucky; the title to the said books would still belong to the said firm. When they deposited them with such warehouse for storage for their own protection they took a storage receipt for the purposes of identification and insurance. They lived in Kentucky. Can they be taxed on the said stored goods and also on the storage receipt too?

"Applying this assumption to the case at bar, can the Appellee, Max Selliger, assuming that he had stored his whiskey in a Kentucky warehouse, be taxed on the whiskey and also on his storage receipts evidencing his title thereto too? Can Max Selliger issue and own an obligation against himself and be taxable on such an obligation, and also on the property represented by such obligation?

205 "We have shown that the Kentucky Statutes, as construed by this Court, localizes bonded whiskey just like it localizes real estate or other tangible property actually situated within its boundary. The holders of bonded warehouse receipts wherever they may reside, like the holders of real estate, wherever they may reside, are taxable if either the bonded whiskey or the real estate be located within the territorial boundary of Kentucky at the dates of assessment."

"Let us suppose that this whiskey of Selliger's, during all the time it has been in Germany, had been in warehouses in Kentucky, and Selliger had held the warehouse receipts as a Kentucky warehouseman. This warehouseman would have been bound to give in the whiskey for taxation. He would have been bound to pay the taxes thereon, but Selliger would have been bound to repay him the

taxes he had thus paid. If Selliger were required to pay the tax on the warehouse receipts he would simply be paying taxes
206 twice on the same thing."

Undoubtedly the taxation of these warehouse receipts as property in and of themselves, and also the taxation of the whiskey by the State of Kentucky, would be double taxation, and we believe this proposition is fully sustained by the arguments of the able counsel for the appellee in their petition for rehearing.

The question is undoubtedly of great and far-reaching importance in the State of Kentucky as affecting a large amount of property. For this reason we submit that the court will consider an entirely proper the request of the counsel for appellee that the opinion upon this case as finally rendered shall be so clear as to create no misapprehension as to its scope and effect.

Respectfully submitted,

MORTON, WEBB & WILSON.

207 And afterwards on the 6th day of June 1907 at a Court of Appeals held at the Capitol at Frankfort, the following order was entered—

COMMONWEALTH, ETC.,
v.
SELLIGER, ETC.

Jefferson.

The Court being sufficiently advised, it is considered that the motion and petition of appellee for a rehearing be and the same is overruled.

And afterwards on the 7th day of June at a Court of Appeals held at the Capitol at Frankfort, the following order was entered—

COMMONWEALTH, ETC.,
v.
SELLIGER, ETC.

Jefferson.

Judge Hobson delivered a dissenting opinion herein.

The dissenting opinion mentioned in the foregoing order is as follows:

208 Court of Appeals of Kentucky.

June 7, 1907. (To be Reported.)

COMMONWEALTH OF KENTUCKY, Appellant,
vs.
MAX SELLIGER, Appellee.

Appeal from Jefferson Circuit Court, Chy., 1st Div.

Dissenting opinion by Judge HOBSON:

The German warehouse receipts are only evidence that appellee has some whiskey in Germany. The whiskey in Germany cannot be taxed here. To tax here the evidence that it is there is but to tax it. To say that the whiskey there is not taxable here, but that the evidence that it is there may be taxed here is to forget
209 that it is the whiskey alone that gives value to the receipt. True appellee may sell and deliver the receipt, but when he does so, he sells and delivers the whisky symbolically. If he had a title bond for a tract of land in another country he might sell and deliver the title bond, still the land would not be taxable here and to tax the title bond would be only in another form to tax the land. If the whiskey was in Kentucky it is manifest, that the whiskey and the receipt could not both be taxed; for this would be to tax the same property twice, as the warehouse receipt is simply a symbol for the property for convenience of delivery. The reason they both cannot be taxed in the case supposed is not because they are both in Kentucky but because one is simply another form of the other.

It is said that by the law merchant warehouse receipts are negotiable and pass from hand to hand by delivery. But this is immaterial, when they so pass, they simply pass as the symbol
210 of the property they represent. What really passes is the property represented by the receipts. In such a transaction herewith, German warehouse receipts, the parties are simply trading in personal property in Germany and the substance of the transaction would be the same if the seller in Kentucky gave the buyer a bill of sale for the property in Germany.

Moreover the law merchant may be now a part of the common law, but it has never been supposed to be a part of the law of nations. We cannot know that the law merchant is in force in Germany or that the receipts held by appellee are of greater force than a letter written to him by the person in Germany saying he held the whiskey for him or subject to his order. As the record stands the legal effect of the transaction is just the same as if appellee had a stallion in Germany and had in his possession here a writing from the person holding the horse binding him to de-
211 liver the horse to any one on his order. In such a case to tax the writing would be to tax the horse.

For these reasons I dissent from the opinion. Judge Lassing concurs in this dissent.

M. J. Holt, Ben F. Washer, For Appellant.
Dodd & Dodd, For Appellee.

212 And afterwards on the 11th day of June 1907 at a Court of Appeals held at the Capitol at Frankfort, the following order was entered to-wit:

COMMONWEALTH, ETC.,
v.
SELLIGER, ETC.

Franklin.

Came the parties by counsel and filed an agreement, as to the extension and correction of mandate herein.

213 Court of Appeals of Kentucky.

COMMONWEALTH OF KENTUCKY, by, &c., Appellant,
vs.
MAX SELLIGER, Appellee.

Agreement.

For the purpose of enabling this Court to make its judgment final so that a writ of error therefrom may be forthwith prosecuted and the validity of the taxes in question determined by the Supreme Court of the United States, it is hereby agreed between the respective parties, by their counsel, that on September 15, 1899, the appellee held warehouse receipts issued by German warehousemen in Hamburg and Bremen, Germany, for 7005 barrels of whiskey stored with them; and in like manner on September 15, 1900, the ap-
214 pellee held like receipts for 6030 barrels of whiskey similarly stored in Germany; and on September 15, 1901, the appellee in like manner held similar receipts for 4250 barrels of whiskey in like manner stored in Germany; and on September 15, 1902, the appellee in like manner held similar receipts for 2566 barrels of whiskey in like manner stored in Germany; and on September 15, 1903, the appellee in like manner held similar receipts for 1611 barrels of whiskey in like manner stored in Germany; and on September 1, 1904, the appellee in like manner held similar receipts for 1564 barrels of whiskey in like manner stored in Germany, all of which said barrels of whiskey were located at the dates aforesaid in German warehouses at Bremen and Hamburg in the German Empire, the said whiskey was at the said several dates of assessment aforesaid of the fair cash value, estimated at the price it would bring at a voluntary sale, of $9.00 per barrel.

COMMONWEALTH OF KENTUCKY,
By M. J. HOLT, *Attorney.*
MAX SELLIGER,
By HUMPHREY & HUMPHREY,
DODD & DODD, *Attorneys.*

215 And on said date at a Court of Appeals held at the Capitol at Frankfort the following order was entered, to wit:

216 M. J. Holt, For Pl'ff.
Humphrey & Humphrey, Dodd & Dodd, Att'y for Appellee.

COMMONWEALTH OF KENTUCKY, by, &c.,
vs.
MAX SELLIGER.

Extension and Correction of Mandate.

As the record shows, by agreement, that the appellee Max Selliger, owned and held warehouse receipts on September 15, 1899, for 7005 barrels of whiskey stored in Bremen and Hamburg, in the German Empire; and on September 15, 1900, for 6030 barrels of whiskey stored at the same places; and on September 15, 1901, for 4250 barrels of whiskey stored in the same places; and on September 15, 1902, for 2566 barrels of whiskey stored in the same places;
217 and on September 15, 1903, for 1611 barrels of whiskey stored in the same places; and on September 1, 1904, for 1564 barrels of whiskey stored in the same places, and that the value of the said whiskey on each of the said assessment dates was the sum of $9.00 per barrel, the opinion and mandate is hereby corrected and extended as to require the lower Court, upon the return of this case, to enter a judgment against appellee for the amounts due upon the above named warehouse receipts valuing them at $9.00 per barrel of whiskey embraced in them for the respective years at the legal rate of taxation for each year, together with legal penalties.

218 Be it remembered that on the 11th day of June 1907, there was filed in the office of the Clerk of the Court of Appeals, an Assignment of Errors, and which is hereto attached and is as follows:

219 Supreme Court of the United States.

MAX SELLIGER, Plaintiff in Error,
vs.
COMMONWEALTH OF KENTUCKY, by GEORGE H. ALEXANDER, Revenue Agent, Defendant in Error.

Assignment of Errors.

The plaintiff in error, above named, assigns the following errors committed to his prejudice by the Court of Appeals of Kentucky in its judgment in the case lately pending in said Court wherein the above named defendant in error was the appellant, and said plaintiff in error was the appellee, viz:

1. The said Court erred in holding that the whiskey of plaintiff in error, and the warehouse or storage receipts evidencing his

title thereto, while situated in Bremen and Hamburg in the German Empire, was subject to taxation or assessment for taxation by the Commonwealth of Kentucky.

2. The said Court of Appeals of Kentucky erred in not exonerating the said whiskey, and the German storage or warehouse receipts evidencing the title of the plaintiff in error thereto, as exports accordingly as required by Sub-section 2 of Section 10 of Article 1 of the Constitution of the United States, and Section 3330 of the United States Revised Statutes.

3. The said Court of Appeals of Kentucky erred in holding that the said whiskey, or the storage receipts evidencing his title thereto, was liable for taxation or assessment for taxation by the Commonwealth of Kentucky when to do so gives the laws of Kentucky an extra territorial force and application, and deprives the plaintiff in error of his property without due process of law contrary
220 to the provisions of the Constitution of the United States, and especially to the Fourteenth Amendment thereof, and would operate to confiscate a single unit of tangible property by extraterritorial imposts against its owner.

4. The said Court of Appeals of Kentucky erred in adjudging that while the said whiskey was liable to assessment for taxation, and to actual taxation in and by the German Empire, as the place of its actual situs, still the storage or warehouse receipts, issued to the plaintiff in error as the exporter and owner thereof when he deposited the whiskey with the German warehousemen, created a distinct and independent assessable and taxable estate in the said whiskey through the said receipts, which, by virtue of such receipts became liable to assessment and taxation in Kentucky, the domicile of the plaintiff in error, when to do so is a plain evasion of the provisions of Section 10 of Article 1 of the Constitution of the United States, and said decision denies to the plaintiff in error the equal protection of the laws and rights conferred on him by the Constitution of the United States and the Fourteenth Amendment thereof.

5. The Court of Appeals of Kentucky erred in holding that the plaintiff in error became liable for assessment and taxation at the same time in two independent sovereignties on a single unit of taxable property, which was exported by him to and stored for his account in the German Empire, merely because, at the time of storing the same, he took from the German warehousemen receipts describing the same, and evidencing his title thereto, when to so hold erroneously differentiates, severs and doubles a single taxable unit, and plainly discriminates against the plaintiff in error, and denies to him the equal protection of the laws and rights guaranteed
221 to him by the Constitution of the United States, and particularly by the provisions of Section 10 of Article 1, and of the Fourteenth Amendment thereof.

6. The said Court of Appeals of Kentucky erred in that its judgment gives effect to the revenue laws of the Commonwealth of Kentucky violative both of the Constitution of the United States, as amended, and Section 171 of the Constitution of the State of Ken-

tucky, in that it subjects to taxation within the territorial limits of Kentucky tangible property located beyond the territorial boundaries of Kentucky and of the United States of America, which ceased to be subject to taxation within any part of the United States after its exportation and so long as it remained beyond the territorial boundaries of the United States.

ALEX. P. HUMPHREY,
HUMPHREY & HUMPHREY,
DODD & DODD,
Att'ys for Plaintiff in Error.

221½ [Endorsed:] Supreme Court of the United States. Max Selliger, Plaintiff in Error, *vs.* Commonwealth of Kentucky, by George H. Alexander, Revenue Agent, Defendant in Error. Assignment of errors. Filed Jun- 11 1907 J. Morgan Chinn, C. C. A.

222 And on said day there was filed in the office of the Clerk of the Court of Appeals, a Writ of Error from the Supreme Court of the United States, and order allowing the writ and which is hereto attached, as follows:

223 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable, the Judges of the Court of Appeals of the Commonwealth of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme Court, called the Court of Appeals of Kentucky, of the Commonwealth of Kentucky, before you, or some of you, being the highest Court of law, or equity of the said State in which a decision could be had in the suit between the Commonwealth of Kentucky, by George H. Alexander, Revenue Agent, and Max Selliger, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the Constitution and laws of the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, statute, or commission, a manifest error hath happened, to the great damage of the said Max Selliger, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all

things concerning the same, to the Supreme Court of the
224 United States, together with this writ, so that you have the same at the City of Washington, on or before thirty days from this date, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 11th day of June, A. D., 1907.

[Seal 6th Circuit Court, Eastern Ky. Dis., U. S. of America.]

WALTER G. CHAPMAN,
Clerk of the United States Circuit Court for the Eastern District of Kentucky, at Frankfort.
Per E. H. COLEMAN, *D. C.*

Allowed by
ED. C. O'REAR,
Chief Justice of the Court of Appeals of the Commonwealth of Kentucky.

224½ [Endorsed:] Court of Appeals of the Commonwealth of Kentucky. Commonwealth of Kentucky, by George H. Alexander, Revenue Agent, Appellant, *vs.* Max Silliger, Appellee. Filed Jun- 11 1907. J. Morgan Chinn, Clerk.

225 And on said date there was filed in the office of the Clerk of the Court of Appeals, a Writ of Error Bond, and which is in words and figures as follows:

226 *Power of Attorney.*

Know all men by these presents:

That the Fidelity and Deposit Company of Maryland, by Chas. R. Miller, its Vice-President, and Geo. H. Gist, its Assistant Secretary, in pursuance of a certain resolution duly passed by the Board of Directors of said Company at a regular meeting of that body held on the 6th day of July, 1898, a copy of which is hereto attached, does hereby nominate, constitute and appoint L. R. Yeaman its true and lawful agent and attorney-in-fact, to make, execute, seal and deliver for and on its behalf as surety, and as its act and deed the appeal bond which Max Selliger is required to give in the case of the Commonwealth of Kentucky *versus* Max Selliger, to be filed with the Clerk of the Court of Appeals of the State of Kentucky, pro-
227 vided the penalty of the bond shall not exceed the sum of Six Thousand ($6,000) Dollars, and the execution of such bonds in pursuance of these presents, shall be as binding upon said Company, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the Company at its office in Baltimore, Maryland, in their own proper persons.

In witness whereof the said Chas. R. Miller, Vice-President, and Geo. H. Gist, Assistant Secretary, have hereunto subscribed their names and affixed the Corporate Seal of the said Fidelity and Deposit Company of Maryland this 27th day of February A. D. 1907.

CHAS. R. MILLER,
Vice-President.

Attest:
GEO. H. GIST,
Assistant Secretary.

At a regular meeting of the Board of Directors of the Fidel-
228 ity and Deposit Company of Maryland, held in its office in the City of Baltimore, State of Maryland, on the 6th day of July, 1898, the following resolution was unanimously adopted, to-wit:

"Whereas, it frequently becomes necessary for a representative of the Company to execute a bond on behalf of the Company, which, for lack of time or some other cause, it is impossible to have executed by the regularly elected officers of the Company;

Therefore be it resolved, that the President, or either of the Vice-Presidents, by and with the concurrence of the Secretary or Assistant Secretary, is hereby authorized to empower any representative of the Company to execute, on behalf of the Company, any bond which the Company might execute through its duly elected officers."

We Chas. R. Miller, Vice-President and Geo. H. Gist, Assist-
229 ant Secretary, of the Fidelity and Deposit Company of Maryland, hereby certify that the aforegoing is a true copy taken from the Records of Proceedings of the Board of Directors of the Fidelity and Deposit Company of Maryland, and is still in force.

In testimony whereof, We have hereunto subscribed our names as Vice-President, and Assistant Secretary, respectively, and affixed the Corporate Seal of the Fidelity and Deposit Company of Maryland this 27th day of February A. D. 1907.

CHAS. R. MILLER,
Vice-President.

GEO. H. GIST,
Assistant Secretary.

STATE OF MARYLAND, *City of Baltimore, ss:*

On this 27th day of February A. D. 1907, before the subscriber, a Notary Public of the State of Maryland, in and for the City of Balti-
230 more, duly commissioned and qualified, came Chas. R. Miller, Vice-President, and Geo. H. Gist, Assistant Secretary, of the Fidelity and Deposit Company of Maryland, to me personally known to be the individuals and officers described in, and who executed, the preceding instrument, and they each acknowledged the execution of the same, and being by me duly sworn severally and each for himself deposeth and saith, that they are the said officers of the Company aforesaid, and that the seal affixed to the preceding instrument is the Corporate Seal of said Company, and that the said Corporate Seal and their signatures as such officers were duly affixed

and subscribed to the said instrument by the authority and direction of the said Corporation.

In testimony whereof, I have hereunto set my hand and affixed my Official Seal, at the City of Baltimore, the day and year first above written.

FRED S. AXTELL,
Notary Public.

Commission expires May, 1908.

231 Court of Appeals of the Commonwealth of Kentucky.

COMMONWEALTH OF KENTUCKY, by GEORGE H. ALEXANDER, Revenue Agent, Appellant,
vs.
MAX SELLIGER, Appellee.

Bond on Writ of Error.

Know all men by these presents: That we, Max Selliger, as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto the appellant, Commonwealth of Kentucky, by George H. Alexander, Revenue Agent, in the just and full sum of Five Thousand Dollars ($5,000.00), to be paid to the said appellant, its attorneys or assigns, to which payment, well and truly to be made, we bind ourselves, our successors, and assigns,
232 jointly and severally, by these presents.

Sealed with our seals, and dated this the 11th day of June, 1907.

Whereas, lately in the Court of Appeals of the Commonwealth of Kentucky, in a suit therein depending, between Commonwealth of Kentucky, by George H. Alexander, Revenue Agent, appellant, and Max Selliger, appellee, a judgment was rendered against the said Max Selliger, and the said appellee has obtained a writ of error, and filed a copy thereof in the clerk's office of the said Court, to reverse the judgment in the aforesaid suit; and a citation directed to the said Commonwealth of Kentucky, by George H. Alexander, Revenue Agent, citing and admonishing it to be and appear at a session of the Supreme Court of the United States, to be holden in the City of Washington on or before thirty days from the date herein above written:

Now, the condition of the above obligation is such, that if
233 the said Max Selliger shall prosecute said writ of error to effect perform the said judgment and answer all damages and costs if he fail to make said plea good, then the above obligation to be void, else to remain in full force and virtue.

MAX SELLIGER,
By E. P. HUMPHREY, *Atty.*
FIDELITY & DEPOSIT CO. OF MD.
By L. R. YEAMAN,
Atty. in Fact.

Signed, sealed and delivered in the presence of

J. MORGAN CHINN,
Clerk Court of Appeals.

Approved and allowed as a Supersedeas Bond by

ED. C. O'REAR,
Chief Justice of the Court of Appeals of Kentucky.

234 And on the 19th day of June 1907 there was filed in the office of the Clerk of the Court of Appeals, the original Citation, with proof of service endorsed thereon, and which is hereto attached as follows:

235 THE UNITED STATES OF AMERICA, *ss:*

To the Commonwealth of Kentucky, by George H. Alexander, Revenue Agent, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the City of Washington, thirty days from this date, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of Kentucky, wherein Max Selliger is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in said writ of error mentioned should not be corrected, and speedy justice be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States this 11 day of June, A. D., 1907.

ED. C. O'REAR,
Chief Justice of the Court of Appeals of Kentucky.

Accepted for the Commonwealth of Kentucky, defendant in error, this 12th day of June, 1907.

M. J. HOLT, *Att'y.*

235½ [Endorsed:] Court of Appeals of the Commonwealth of Kentucky. Commonwealth of Kentucky, by George H. Alexander, Revenue Agent, Appellant, *vs.* Max Selliger, Appellee. Citation. Filed Jun- 19, 1907. J. Morgan Chinn, Clerk.

236 COMMONWEALTH OF KENTUCKY,
The Court of Appeals, set:

In obedience to the commands of the within Writ of Error I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the case named in said Writ of Error, with all things concerning same.

In witness whereof, I have hereunto set my hand and affixed the seal of my office. Done at the Capitol at Frankfort, this 20th day of June, 1907.

[Seal Kentucky Court of Appeals.]

J. MORGAN CHINN,
Clerk Court of Appeals of Kentucky.

Endorsed on cover: File No. 20,773. Kentucky court of appeals. Term No. 115. Max Selliger, plaintiff in error, *vs.* The Commonwealth of Kentucky, by George H. Alexander, revenue agent. Filed July 1st, 1907. File No. 20,773.

No. 115.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

Office Supreme Court, U.
FILED.
SEP 21 1908
JAMES H. McKENNEY
Clerk

Max Selliger, - - - - - - - *Plaintiff in Error,*

VERSUS

Commonwealth of Kentucky by George H. Alexander, Revenue Agent, - *Defendant in Error.*

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

BRIEF FOR PLAINTIFF IN ERROR.

ALEXANDER POPE HUMPHREY,
JOHN L. DODD,
JOSEPH C. DODD,
Attorneys for Plaintiff in Error.

HUMPHREY, DAVIE & HUMPHREY,
DODD & DODD,
Counsel.

JOHN P. MORTON & COMPANY, INCORPORATED, LOUISVILLE

Supreme Court of the United States.

October Term, 1908.

MAX SELLIGER, - - - - - - - *Plaintiff in Error,*

vs. IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

COMMONWEALTH OF KENTUCKY BY GEORGE H. ALEXANDER, REVENUE AGENT, - *Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This case comes here on writ of error to the judgment of the Court of Appeals of the State of Kentucky. A proceeding, under a statute of Kentucky, was begun by the Commonwealth of Kentucky through its revenue agent against Selliger, claiming that the defendant had failed to list for taxation certain property belonging to him and subject to assessment as of the 15th day of September of the years 1899 to 1904, inclusive. The County Court of Jefferson County, which was the court of first instance, dismissed the proceeding. On appeal to the Jefferson Circuit Court this order was affirmed,

and on further appeal by the Commonwealth to the Court of Appeals of Kentucky the judgments of the County Court and Circuit Court were reversed and the case remanded with directions to enter a judgment against Selliger. This mandate is as follows:

> "As the record shows, by agreement, that the appellee, Max Selliger, owned and held warehouse receipts on September 15, 1899, for 7,005 barrels of whisky stored in Bremen and Hamburg in the German Empire; and on September 15, 1900, for 6,030 barrels of whisky stored at the same places; and on September 15, 1901, for 4,250 barrels of whisky stored in the same places; and on September 15, 1902, for 2,566 barrels of whisky stored in the same places; and on September 15, 1903, for 1,611 barrels of whisky stored in the same places; and on September 1, 1904, for 1,564 barrels of whisky stored in the same places, and that the value of the said whisky on each of the said assessment dates was the sum of $9 per barrel, the opinion and mandate is hereby corrected and extended as to require the lower court, upon the return of this case, to enter a judgment against appellee for the amounts due upon the above-named warehouse receipts, valuing them at $9 per barrel of whisky, embraced in them for the respective years at the legal rate of taxation for each year, together with legal penalties."

It appears from the evidence in the case that Selliger was the owner of a large amount of whisky stored in distillery bonded warehouses in Kentucky; that prior to the expiration of the period, during which the whisky was allowed to remain in bond without payment of the Government revenue tax, Selliger, as allowed by the

statutes of the United States, exported a large quantity of this whisky, part to Hamburg and part to Bremen, the whisky going in the usual barrel package. It further appears that, as Selliger stored this whisky in warehouses in Hamburg and Bremen, he received from the warehouse-keepers the ordinary warehouse receipt. From time to time Selliger has sold part of this whisky abroad and other parts to persons in Kentucky and other States of the Union, in the latter case the whisky being reimported by the purchaser, but there remaining in the warehouses in Hamburg and Bremen the number of barrels set out in the mandate as above. It was insisted by Selliger, in all three of the courts, that this whisky could not be taxed by the State of Kentucky, because, *first,* such a tax would violate the provisions of the 10th section of the First Article of the Constitution of the United States, wherein it is provided that no State shall, without the consent of Congress, lay imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws (R. 10); *second,* because the whisky during all of the years of its attempted taxation had a situs in the German Empire and could not, therefore, be taxed in the State of Kentucky without violating the Fourteenth Amendment of the Constitution of the United States (R. 15).

The County Court (R. 16) held for Selliger on both these propositions, and, while finding the aforesaid amount of whisky owned by him and thus stored abroad at each

of the dates mentioned, dismissed the proceeding (R. 17). The Circuit Court affirmed this judgment upon the latter, but not upon the former ground (R. 31 and 32). The Court of Appeals held against Selliger on both propositions (R. 34).

A petition for rehearing was presented in the State Appellate Court (R. 38), to which the Commonwealth responded (R. 51). There is also a supplemental petition for rehearing (R. 66). The Court of Appeals, however, overruled the petition for rehearing, Judges Hobson and Lassing dissenting. For their dissent, see R. 69. Thereupon a writ of error was sued out and allowed to this court (R. 73).

ASSIGNMENT OF ERRORS.

The plaintiff in error has brought the case here on the following assignment of errors:

> "The plaintiff in error assigns the following errors committed to his prejudice by the Court of Appeals of Kentucky in its judgment in the case lately pending in said court wherein the above-named defendant in error was the appellant, and said plaintiff in error was the appellee, viz.:
>
> "1. The said court erred in holding that the whisky of plaintiff in error, and the warehouse or storage receipts evidencing his title thereto, while situated in Bremen and Hamburg in the German Empire, was subject to taxation or assessment for taxation by the Commonwealth of Kentucky.
>
> "2. The said Court of Appeals of Kentucky erred in not exonerating the said whisky, and the

German storage or warehouse receipts evidencing the title of the plaintiff in error thereto, as exports accordingly as required by Sub-section 2 of Section 10 of Article 1 of the Constitution of the United States, and Section 3330 of the United States Revised Statutes.

"3. The said Court of Appeals of Kentucky erred in holding that the said whisky, or the storage receipts evidencing his title thereto, was liable for taxation or assessment for taxation by the Commonwealth of Kentucky, when to do so gives the laws of Kentucky an extra-territorial force and application, and deprives the plaintiff in error of his property without due process of law contrary to the provisions of the Constitution of the United States, and especially to the Fourteenth Amendment thereof, and would operate to confiscate a single unit of tangible property by extra-territorial imposts against its owner.

"4. The said Court of Appeals of Kentucky erred in adjudging that while the said whisky was liable to assessment for taxation, and to actual taxation in and by the German Empire, as the place of its actual situs, still the storage or warehouse receipts, issued to the plaintiff in error as the exporter and owner thereof when he deposited the whisky with the German warehousemen, created a distinct and independent assessable and taxable estate in the said whisky through the said receipts, which, by virtue of such receipts, became liable to assessment and taxation in Kentucky, the domicile of the plaintiff in error, when to do so is a plain evasion of the provisions of Section 10 of Article 1 of the Constitution of the United States, and said decision denies to the plaintiff in error the equal protection of the laws and rights conferred on him by the Constitution of the United States and the Fourteenth Amendment thereof.

"5. The Court of Appeals of Kentucky erred in holding that the plaintiff in error became liable for assessment and taxation at the same time *in two independent sovereignties on a single unit of taxable property,* which was exported by him to and stored for his account in the German Empire, merely because, at the time of storing the same, he took from the German warehousemen receipts describing the same, and evidencing his title thereto, when to so hold erroneously differentiates, severs, and doubles a single taxable unit, and plainly discriminates against the plaintiff in error, and denies to him the equal protection of the laws and rights guaranteed to him by the Constitution of the United States, and particularly by the provisions of Section 10 of Article 1 and of the Fourteenth Amendment thereof.

"6. The said Court of Appeals of Kentucky erred in that its judgment gives effect to the revenue laws of the Commonwealth of Kentucky violative both of the Constitution of the United States, as amended, and Section 171 of the Constitution of the State of Kentucky, in that it subjects to taxation within the territorial limits of Kentucky tangible property located beyond the territorial boundaries of Kentucky and of the United States of America, which ceases to be subject to taxation within any part of the United States after its exportation and so long as it remains beyond the territorial boundaries of the United States" (R. 71, 72, and 73).

ARGUMENT.

It will appear, by reference to the response of the Commonwealth to Selliger's petition for rehearing, that argument has been made to the effect that Selliger had an unlawful motive or purpose in exporting this whisky. This argument can not be urged here, because it is unsupported by the testimony and is concluded by the opinion of the Court of Appeals. We quote from the testimony of Mr. Selliger (R. 25):

> "Q. 108. Mr. Selliger, when these whiskies were exported, I will ask you whether or not they were not exported under the revenue forms prescribed by the Secretary of the Treasury of the United States? A. Yes, sir.
>
> "Q. 109. I will ask you if you have a form under which they were exported before you now? A. Yes, sir; this is the form—'Form No. 206, Revised August, 1895. United States Internal Revenue. Notice and Declaration of Intention to Export.'
>
> (By Mr. Dodd: I wish to offer this form in evidence as 'Exhibit A.')
>
> "Q. 110. Mr. Holt has asked you something about whether it was not your purpose to avail yourself of all the delays allowed by law, bonded periods, etc.—state whether or not any of this whisky was exported for the purpose of evading any of the laws of Kentucky or the United States. A. No, sir; they were not. We thought it was more profitable to send them abroad, else we would have to tax-pay them and keep them here.
>
> "Q. 111. You say there was a large over-production? A. Yes, sir.

"Q. 112. Now, Mr. Holt has gone into the sale of this whisky while abroad. State whether or not this whisky was exported for sale? A. It was.

"Q. 113. In good faith? A. It was."

Again the Court of Appeals, in its opinion in this case, said:

> "We do not apprehend that the motive of the exporter could ever safely be inquired into, for if a State could say to such, we find the fact to be that you are not exporting in good faith for sale or permanent location of your property abroad, therefore we will tax it, notwithstanding it is export merchandise, in that way the State could vexatiously interfere with a subject over which Congress has been ceded the entire control. It is safer to treat the property exported as being thereafter within the jurisdiction of the government within whose territory it may be lodged. The whisky in the case at bar having been stored in a warehouse in Germany, where it became a part of the mass of property within the German Empire, doubtless owed a duty to pay taxes to the support of that government while there. The State of Kentucky neither had nor should attempt to exercise further jurisdiction over it for any purpose."

The Court of Appeals based its decision upon the ownership by Selliger (a citizen of Kentucky) of the warehouse receipts issued by the warehousekeepers of Hamburg and Bremen. It held that these warehouse receipts were in and of themselves property, distinct and separate from the whisky represented by them, and were subject to taxation as are promissory notes and bonds.

I.

THE TAX IN QUESTION VIOLATES SECTION 10 OF ARTICLE 1 OF THE CONSTITUTION OF THE UNITED STATES PROHIBITING A STATE FROM LAYING ANY TAX UPON EXPORTS.

Whisky, while stored in distillery bonded warehouses in Kentucky, is taxed in the following manner:

The State Board of Valuation and Assessment fixes the value of such whisky. The owner of the distillery bonded warehouse is required to report at stated periods the amount of whisky withdrawn on the payment of the revenue tax to the General Government, and he is required at that time to pay the State and county taxes on such whisky. This is without regard to who owns it; that is, without regard to whether the original manufacturer of the whisky still retains title to it or has issued warehouse receipts upon it to the purchasers. Upon payment of such tax, however, the owner of the distillery bonded warehouse has a lien upon the whisky for his reimbursement.

This method of taxation is described in Commonwealth v. Taylor, 101 Ky. 330, and Commonwealth v. Rosenfield, 118 Ky. 374.

So much for whisky in distillery bonded warehouses.

Where whisky is in a free warehouse it is the duty of the warehouseman to report it for taxation, and, having paid the taxes thereon, he is entitled to recover from the owner the amount of the tax so paid, and interest, and this constitutes a lien upon the property upon which the tax is paid.

Section 4033, Ky. Stats., provides:

> "Whenever the occupant or tenant of any land, or bailee or person in possession of any personal property, shall pay the tax thereon which the owner ought to pay, the person paying the tax shall be entitled to recover of the owner the amount of the tax so paid, and interest, which shall constitute a lien on the property upon which such tax was paid."

And by Section 4023 it is provided:

> "The holder of the legal title and the holder of the equitable title and the claimant or bailee in possession of the property on the 15th of September of the year the assessment is made, shall be liable for taxes thereon, and, as between themselves, it shall be the duty of the holder of the equitable title to list the property and pay the taxes thereon, whether the property be in possession or not at the time of the payment."

It is apparent that if this whisky had remained in a Kentucky warehouse, whether a distillery bonded warehouse or a free warehouse, the tax would only have been paid upon the whisky *once*. In other words, the owner of the warehouse would have paid the tax and have charged it with interest against the holder of the ware-

house receipt, whether such holder were or were not a resident of the State of Kentucky.

Under the law of the State of Kentucky double taxation has been declared to be unconstitutional. Standard Oil Co. v. Commonwealth, 119 Ky. 80.

It is therefore plain, we submit, that in Kentucky there could not be a taxation upon whisky and also upon the warehouse receipt representing the whisky. Can there be this taxation if the whisky has been exported and, remaining in its original packages in the foreign country, is represented by warehouse receipts in the hands of the owner and exporter in this country?

The leading case on the subject of taxation by a State on imports and exports is Brown v. Maryland, 12 Wheat. 419. In the course of its opinion this court said:

> "From motives which were deemed sufficient by the statesmen of that day, the general power of taxation, indispensably necessary as it was, and jealous as the States were of any encroachment on it, was so far abridged as to forbid them to touch imports or exports, with the single exception which has been noticed. Why are they restrained from imposing these duties? Plainly, because, in the general opinion, the interest of all would be best promoted by placing that whole subject under the control of Congress. Whether the prohibition to 'lay imposts or duties on imports or exports,' proceeded from an apprehension that the power might be so exercised as to disturb that equality among the States which was generally advantageous, or that harmony between them which it was desirable to preserve, or to maintain unimpaired our commercial

connections with foreign nations, or to confer this source of revenue on the government of the Union, or whatever other motive might have induced the prohibition, it is plain that the object would be as completely defeated by a power to tax the article in the hands of the importer, the instant it was landed, as by a power to tax it while entering the port. There is no difference, in effect, between a power to prohibit the sale of an article and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold."

The court then proceeded to decide that the prohibition was not limited to the act of importation or exportation, but continued until the article had been so acted upon by its owner that it became incorporated and mixed up with the mass of the property in the country.

In that case Chief Justice Taney was counsel for the State of Maryland, and at the time believed the decision erroneous. After subsequently becoming Chief Justice, in his opinion in the License Cases, 5 How. 575, he took occasion to say:

"Certainly, I, at that time, persuaded myself that I was right, and thought the decision of the court restricted the powers of the State more than a sound construction of the Constitution of the United States would warrant. But further and more mature reflection has convinced me that the rule laid down by the Supreme Court is a just and safe one, and perhaps the best that could have been adopted for preserving the rights of the United States on the one hand, and of the States on the other, and preventing collision between them. * * * Indeed, goods im-

ported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country can, in no just sense, be regarded as a part of that mass of property in the State usually taxed for the support of the State government."

In Almy v. California, 24 How. 169, the validity of a State tax on bills of lading for gold and silver *exported* from that State was involved. This court, speaking through Chief Justice Taney, referring to the case of Brown v. Maryland, said:

> "That case was decided in 1827, and the decision has always been regarded and followed as the true construction of the clause of the Constitution now in question. * * *
>
> "If the tax was laid on the gold or silver exported, every one would see that it was repugnant to the Constitution of the United States, which in express terms declares that 'no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.'
>
> "But a tax or duty on a bill of lading, although differing in form from a duty on the article shipped, is, in substance, the same thing, for a bill of lading, or some written instrument of the same import, is necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another. The necessities of commerce require it. * * * A bill of lading, therefore, or some equivalent instrument of writing, is invariably associated with every cargo of merchandise exported to a foreign country, and, consequently, a duty upon that is, in substance and effect, a duty on the article

exported. And if the law of California is constitutional, then every cargo of every description exported from the United States may be made to pay an export duty to the State, provided the tax is imposed in the form of a tax on the bill of lading, and this is in direct opposition to the plain and express prohibition in the Constitution of the United States.
* * *

"In the judgment of this court the State tax in question is a duty upon the export of gold and silver, and, consequently, repugnant to the clause in the Constitution hereinbefore referred to."

The case of Low v. Austin, 13 Wall. 29, is an important one in this connection. In that case it appeared that Low was an importer, shipping and commission merchant in the city of San Francisco, California, and in 1868 received, on consignment from persons in France, certain champagne wine, upon which he paid the duties and charges of the custom house. He then stored the wine in his warehouse in San Francisco in the original cases in which the wines were imported, where they remained for sale. While in this condition they were assessed as the property of Low for State, city and county taxes, under the general revenue law of California. In holding that such property could be taxed by the State of California the Supreme Court of that State said:

"It is contended that the property taxed in this case had not become incorporated with the mass of the general wealth of the State simply because it was still the property of the importer in the original packages in which it was imported. We see nothing in this which even tends to show that the property

had not become incorporated with the general wealth of the State. We see no reason why imported goods, exposed in the store of a merchant for sale, do not constitute a portion of the wealth of the State as much as domestic goods, nor do we see the slightest difference whether the importer is also the merchant who sells or whether the goods are in the original packages or not."

Again that court said:

"A tax which is imposed alike upon all the property of the State can not in any sense be considered a tax upon commerce."

Again:

"The tax prohibited must be a tax upon the character of the goods as importations, rather than upon the goods themselves as property."

So much for the argument of the Supreme Court of California.

This reasoning was distinctly repudiated by this court, and it was held that the goods while retaining their character as imports could not be taxed. The court said:

"The question is not as to the extent of the tax, or its equality with respect to taxes on other property, but as to the power of the State to levy any tax. If, at any point of time between the arrival of the goods in port and their breakage from the original cases, or sale by the importer, they become subject to State taxation, the extent and the character of the tax are mere matters of legislative discretion."

Again this court said:

"The argument for the tax, on the wines in the present case, that it is not greater than the tax upon other property of the same value held by citizens of the State, would justify a like tax upon securities of the United States, in which form probably a large amount of the property of some of her citizens consists; yet it has been repeatedly held that such securities are exempted from State taxation whether the tax be imposed directly upon them by name or upon them as forming a part in the aggregate of the property of the taxpayer. The rule is general that whenever taxation by a State is forbidden, or would interfere with the full exercise of a power vested in the government of the United States over the same subject, it can not be imposed. Imports, therefore, whilst retaining their distinctive character as such, must be treated as being without the jurisdiction of the taxing power of the State."

The case of May v. New Orleans, 178 U. S. 504, is in no way inimical to the case of Low v. Austin which we have just cited, the turning point in the May case being that the goods there taxed by the State had been taken from the original packages, which had been broken up and separated into parts.

If to tax a bill of lading is to tax the goods represented by the bill of lading, it is equally true that to tax a warehouse receipt is to tax the goods represented by the warehouse receipt. If a warehouse receipt can be taxed, so can any other evidence of title to goods be taxed. If, therefore, the State can tax any evidence of title to goods exported, after their exportation, it will be enabled practically to tax all exports, and continue to tax them no matter where they are situate so long as the owner

of the exported goods remains a citizen of the State. If, therefore, we are to have regard to things rather than names, it would seem clear that the tax here levied is forbidden by the Constitution as a tax upon exports.

The Court of Appeals of Kentucky fell into the same error as that which characterized the opinion of the Supreme Court of California in its judgment, which was reversed in the case of Low v. Austin, 13 Wall. 29. Thus the Court of Appeals of Kentucky said:

> "Whether the inhibition of the Federal Constitution be against the levying of a tax, by way of impost or duty, upon the act alone of exporting property, we do not deem it necessary to decide in this case. It may be safely conceded that to levy a tax upon exported property which should operate indirectly as the laying of a duty upon the export is as pernicious as to lay it directly. We do not find the slightest evidence of a purpose on the part of the State to lay a duty on the whisky because it was exported by imposing the tax in question. On the contrary, the tax is levied upon all personal property owned by citizens of this State, wherever situated (if subject at all to the taxing jurisdiction of the State), upon the sole theory that its situs for the purposes of taxation is the domicile of the owner, and as the owner resides here and has the benefit of the protection of the laws and government of this State over his person, he should, in proportion to the wealth which attends his person, bear his share of the expense of the State government."

This reasoning is completely answered by the extracts we have given above from the opinion of this court in Low v. Austin.

II.

THE TAX HERE ATTEMPTED TO BE LEVIED IS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

It has been firmly settled by this court that personal property having an actual situs beyond the territorial boundary of a State can not be taxed by that State.

In the case of Louisville & Jeffersonville Ferry Co. v. Kentucky, 188 U. S. 385, the State of Kentucky undertook to tax the franchise granted by Indiana to a Kentucky corporation to operate a ferry across the Ohio River, and this court held that such taxation of the Indiana franchise by Kentucky would amount to a deprivation of property without due process of law, in violation of the provisions of the Fourteenth Amendment, and reversed the judgment of the Court of Appeals of Kentucky sustaining such tax.

In the case of Delaware R. R. Co. v. Pennsylvania, 198 U. S. 341, the vital question was whether coal, mined by a Pennsylvania corporation and transported by it from that State to foreign States for the purposes of sale, could be either directly or indirectly taxed by Pennsylvania, and this court held that it could not, saying:

> "Taxation of the coal in this case deprived the owner of its property without due process of law, and the owner is entitled to the protection of the

Fourteenth Amendment, which prevents the taking of its property in that way."

In the case of Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, the question involved was stated by this court to be as follows:

> "In this case the question is directly presented whether a corporation organized under the laws of Kentucky is subject to taxation upon its tangible property permanently located in other States and employed there in the prosecution of its business. Such taxation is charged to be a violation of the due process of law clause of the Fourteenth Amendment."

At the close of an exhaustive opinion this court said:

> "We are of the opinion that the cars in question, so far as located and employed in other States than Kentucky, were not subject to the taxing power of that Commonwealth, and that the judgment of the Court of Appeals must be reversed," etc.

In the case of Ayer & Lord Tie Co. v. Kentucky, 202 U. S. 409, this court held that vessels engaged in interstate commerce, which have acquired a permanent situs for taxation and are taxed in another State, are not subject to taxation by the State of Kentucky, nor is their situs for taxation therein on account of being enrolled at a port of that State.

The Court of Appeals attempts to show that these cases have no application. Thus the court says:

> "Although the taxing statute of this State provides (Section 4020, Ky. Stats.): 'All real and per-

sonal estate within this State, and all personal estate of persons residing in this State, * * * shall be subject to taxation unless the same be exempt from taxation by the Constitution,' it must be construed not to mean personal estate owned by persons residing in this State, but which is tangible and permanently located in other States and employed there in the prosecution of the owner's business. Such property not enjoying any benefit or protection from the laws of this State, but deriving such benefit wholly from the laws of the State where situated, for which it is presumably taxed there, is not deemed within the taxing jurisdiction of this State. Union Refrigerator Tr. Co. v. Kentucky, 26 Sup. Rep. 102 (U. S.), 36."

Again the court said:

"The whisky in the case at bar having been stored in a warehouse in Germany, where it became a part of the mass of property within the German Empire, doubtless owed a duty to pay taxes to the support of that government while there. The State of Kentucky neither had nor should attempt to exercise further jurisdiction over it for any purpose. The warehousemen in Germany who issued warehouse receipts for the whisky created a distinct property in the receipts. While in a sense they represented the whisky, being its symbol for certain purposes, it could scarcely be maintained, for it is not true, that they stand in lieu of the whisky for all commercial purposes. Like all symbols, they are fictions; so are promissory notes and bonds. Each is a representative or evidence of something else. Yet everywhere each has an individual value derivative, it is true, from the thing upon which it is rested, yet is deemed distinct property."

Again the court said:

> "A warehouse receipt partakes of some of the same features. Its original value may depend entirely on the value of the chattel it represents and which is deemed to be in pledge to redeem it. But such receipts are generally negotiable as bonds and bills of exchange are. Each endorser may add materially to their value. They float upon the markets of the world as property as surely as bonds are property. Whoever owns them owns that much of assets, having such value as the market affords to them, which may be sold, hypothecated, attached for debt, and are the subject of inheritance. Like other choses in action their situs is that of their owner. His security and comfort given to him by government enable him to hold and enjoy them."

Again:

> "We are of opinion, and without hesitation hold, that warehouse receipts, wherever issued, and whatever they may represent, are intangible personal property, whose situs for purposes of taxation is the domicile of their owner. They may be and should be taxed at his domicile at such value as they may have had on the day fixed by the statute for listing property generally for taxation."

All this, we think, is fully and completely answered by the dissenting opinion of Judge Hobson, which we give in full:

> "The German warehouse receipts are only evidence that appellee has some whisky in Germany. The whisky in Germany can not be taxed here. To tax here the evidence that it is there is but to tax it. To say that the whisky there is not taxable here,

but that the evidence that it is there may be taxed here is to forget that it is the whisky alone that gives value to the receipt. True, appellee may sell and deliver the receipt, but when he does so, he sells and delivers the whisky symbolically. If he had a title bond for a tract of land in another country he might sell and deliver the title bond, still the land would not be taxable here, and to tax the title bond would be, only in another form, to tax the land. If the whisky was in Kentucky it is manifest that the whisky and the receipt could not both be taxed, for this would be to tax the same property twice, as the warehouse receipt is simply a symbol for the property for convenience of delivery. The reason they both can not be taxed in the case supposed is not because they are both in Kentucky, but because one is simply another form of the other.

"It is said that by the law merchant warehouse receipts are negotiable and pass from hand to hand by delivery. But this is immaterial; when they so pass, they simply pass as the symbol of the property they represent. What really passes is the property represented by the receipts. In such a transaction herewith, German warehouse receipts, the parties are simply trading in personal property in Germany, and the substance of the transaction would be the same if the seller in Kentucky gave the buyer a bill of sale for the property in Germany.

"Moreover, the law merchant may be now a part of the common law, but it has never been supposed to be a part of the law of nations. We can not know that the law merchant is in force in Germany or that the receipts held by appellee are of greater force than a letter written to him by the person in Germany saying he held the whisky for him or subject to his order. As the record stands the legal effect of the transaction is just the same as if appel-

lee had a stallion in Germany and had in his possession here a writing from the person holding the horse binding him to deliver the horse to any one on his order. In such a case to tax the writing would be to tax the horse.

"For these reasons I dissent from the opinion. Judge Lassing concurs in this dissent." (R. 69.)

A warehouse receipt is nothing more nor less than a document of title, and has always been so treated. One of its uses is as a means by which delivery can be made of an article of personal property which has been sold.

In 2 Benj. on Sales, 1043, it is said:

"There may be symbolical delivery of goods, divesting the vendor's possession and lien. Lord Ellenborough said, in Chaplin v. Rogers, 1 East. 192, that 'where goods are ponderous and incapable of being handed over from one to another, there need not be an actual delivery, but it may be done by that which is tantamount, such as the delivery of the key of a warehouse in which the goods are lodged, or by the delivery of other indicia of property.'"

Surely no one would contend that the possession by a resident of Kentucky of a key to a warehouse in Germany would make the key taxable as representative of the value of the goods in the warehouse.

In 10 A. & E. Ency. of Law, 1, under the title "Documents of Title," there is a note in which it is stated:

"By the factors' act of 5th and 6th Victoria a document of title is stated to mean any bill of lading, India warrant, dock warrant, warehousekeeper's certificate, warrant, or order for the delivery of

goods or any other document, in the ordinary course of business, as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessors of such document to transfer or receive goods thereby represented."

It is to observed that, among other things described as documents of title, is a warehouse receipt.

In the leading case of Gibson v. Stevens, 8 How. (U. S.), 399, 400, the court said:

"In the opinion of the court it (storage or warehouse receipt) transferred to him the legal title and constructive possession of the property; and the warehouseman from the time of its transfer became his bailee, and held the pork and flour for him. The delivery of the evidences of title and the orders endorsed upon them was equivalent, in the then situation of the property, to the delivery of the property itself. * * * A ship at sea may be transferred to a purchaser by delivery of a bill of sale. So as to the cargo by the endorsement and delivery of the bill of lading. The articles in the warehouse at Ft. Wayne were incapable of actual delivery, consequently the delivery of the evidences of title, with the order to the bailees endorsed on them, passed the title and possession to the plaintiff. The endorsement of the delivery order upon his evidence of title, like the endorsement upon a bill of lading, sufficiently manifests the intention of the parties that the title and possession should pass to Gibson."

The above ruling has been steadily adhered to and followed by the Supreme Court in the following cases:

Leonard v. Davis, 1 Black, 482, 483.
Holliday v. Hamilton, 11 Wall. 564, 565.
The Thames, 14 Wall. 106.
Crapo v. Kelly, 16 Wall. 640.
Insurance Co. v. Kiger, 103 U. S. 556.
Union Trust Co. v. Wilson, 198 U. S. 538-9.

It has been repeatedly held, by the different State courts of our country, that a warehouse receipt is not technically a negotiable instrument, but merely stands as evidence of title to the property it represents.

Warehouse receipts for goods left on storage are not like promissory notes for the payment of money.

The receipts issued by the German warehousemen only imposed upon them in favor of the appellee, Max Selliger, as the holder thereof, an obligation to preserve the property stored, and to deliver and surrender the specific whisky therein described according to the terms of the receipts. The warehousemen derived no title to or other interest in the property than for their storage charges.

The Court of Appeals of Kentucky seems to rely on the negotiability of the warehouse receipts as giving strength to its argument that here were two distinct properties—one, the whisky in the foreign warehouse; the other, the warehouse receipts in the possession of Selliger.

Suppose a man has a thousand barrels of whisky in his own possession, worth $9 a barrel. This is $9,000 of taxable wealth. Suppose that man sends this $9,000 worth of whisky out of the country to Germany. There

results a diminution of the taxable wealth of this country to the amount of $9,000, and an accretion to the taxable wealth of Germany of $9,000. Suppose this whisky, instead of being put in a house belonging to the owner, is put in a house belonging to some third person—the warehouseman—and he issues a warehouse receipt, which he mails to the owner of the whisky in this country, is it possible that by mailing this warehouse receipt the German warehousekeeper has added $9,000 to the wealth of this country? The wealth of Germany has suffered no diminution, but by this magic the taxable wealth of Germany has been increased and the taxable wealth of this country not diminished. Does the negotiable character of the receipt affect at all the question of its symbolic character? We submit that it does not.

At the common law the sale of personal property to a *bona fide* purchaser did not give to such purchaser a title better than that which belonged to his vendor. In other words, a thief could not transfer title to any ordinary article of personal property. There was, however, an exception to this. By the custom of London where goods were sold in Market Overt the *bona fide* purchaser obtained a title, even though the title of the vendor was not good. Personal property, by the custom of London in Market Overt, was "negotiable." When warehouse receipts are made negotiable the same result, and no other, follows. The purchaser of a negotiable warehouse

receipt gets title to the property by the transfer to him of the negotiable warehouse receipt, even though the holder and transferer of the receipt did not have such title, provided that the depositor of the goods had title, and there is a liability upon the endorser of a negotiable warehouse receipt to the extent that he guarantees that the goods therein represented are in store and will be delivered on demand by the warehouseman upon the production of the warehouse receipt. The same is true of a bill of lading, if made negotiable by its terms or by statute, or of any other document of title to personal property.

The transfer of a warehouse receipt or of a bill of lading effects two results: (1) It transfers the title to the property therein embraced; (2) it transfers the possession of the property therein embraced.

After the transfer of a warehouse receipt, bill of lading, or other document of title, the bailee (the warehousekeeper or the carrier) becomes the bailee of the transferee of the title. To say, therefore, that these warehouse receipts are negotiable does not, we submit, in the least strengthen the proposition that a warehouse receipt is property in and of itself. A negotiable warehouse receipt is no more and no less a symbol or representative of property than a non-negotiable warehouse receipt.

We submit, therefore, that the discussion of the negotiability of the warehouse receipt is not relevant to this

controversy, and that it is plain that the only property in existence is the whisky that has an actual situs in the German Empire.

The Court of Appeals of Kentucky obviously appreciated the obstacles in its persistent efforts to uphold and apply the maxim of *mobilia sequunter personam* in spite of the decisions of this court to the contrary as cited *supra*. It seems to have reached the illogical conclusion that a single item of tangible personal property could have a taxable situs in Germany and in Kentucky at the same instant of time. To accomplish this result it was necessary for the said court to differentiate the property itself from the exporter's evidence of title thereto, and to hold that the bailee's written acknowledgment of the deposit of the actual tangible property duplicated or created two distinct properties—one in the storage receipts acknowledging the deposit and the other in the property itself. However, when it came to apply the same to the case at bar, in its final mandate, it was necessarily confined to the valuation of the tangible property itself, as is shown from its mandate. It disregarded any separate valuation of the receipts, in and of themselves, and based its valuation on the whisky alone, saying:

> "That as the value of *the said whisky* on each of the said assessment dates was the sum of $9 per barrel, the opinion and mandate is hereby corrected and extended as to require the lower court, upon the return of this cause, to enter a judgment against appellee for the amounts due upon the above-named

warehouse receipts, *valuing them at $9 per barrel of whisky embraced in them* for the respective years, at the legal rate of taxation for each year, together with legal penalties" (R. 71).

This demonstrates, as we believe, the impossibility of differentiating the receipts from the whisky itself, and shows the fundamental error in the judgment under review.

The plaintiff in error owned the whisky, and held his bailee's receipts as evidence of his title, and we think the following extract from the dissenting opinion is a correct statement of the law applicable to this case:

> "The German warehouse receipts are only evidence that appellee has some whisky in Germany. The whisky in Germany can not be taxed here. To tax here the evidence that it is there is but to tax it. To say that the whisky there is not taxable here, but that the evidence that it is there may be taxed here, is to forget that it is the whisky alone that gives value to the receipt. * * * If the whisky was in Kentucky it is manifest that the whisky and the receipts could not both be taxed, for this would be to tax the same property twice, as the warehouse receipt is simply a symbol for the property for convenience of delivery. The reason they both can not be taxed in the case supposed is not because they are both in Kentucky, but because one is simply another form of the other" (R. 69).

It seems to us that this logic is unanswerable. The property is tangible. It is permanently located in a foreign sovereignty and taxable there. A mere writing acknowledging that the bailee holds the title for the bailor

is purely evidential and nothing more than a muniment of title. Its sole value consists of its evidential statement that the owner has deposited in the German warehouse so much specifically described whisky. The fact that this acknowledgment is in the form of a warehouse receipt does not change the situs of the thing deposited, nor does it increase the quantity of the whisky. Apart from the tangible property itself the warehouse receipt creates no more property than a spurious or forged receipt could give. It neither creates any new property nor does it add any value to that already in existence.

The case of Almy v. California, 24 How. *supra,* illustrates this contention. There, as here, the effort was made to tax storage or warehouse receipts for exported articles and failed. This court had no difficulty in reaching the conclusion in that case that a tax upon the bill of lading, or other equivalent instrument, was, in substance and effect, a tax on the article exported.

Bouvier defines "receipt" to mean "a written acknowledgment of the payment of money or *delivery of chattels.*"

The original Congressional bonded warehousing act was before this court in Tremlett v. Adams, 13 How. 303, where the court said:

> "It is a part of the general and permanent system of revenue, and its evident object is to facilitate and encourage commerce by exempting the importer from the payment of duties until he is ready to bring his goods into market,"

thus evidencing a purpose to relieve foreign commerce from the payment of duties until it actually becomes commingled with the other taxable property of the country.

In Pollock v. Farmers Loan & Trust Co., 157 U. S. 581 *et seq.*, the case of Almy v. California was cited and reaffirmed and other authorities cited and approved.

In Postal Telegraph Co. v. Adams, 155 U. S. 698, this court said:

> "The substance, and not the shadow, determines the validity of the exercise of the power."

In Dobbins v. Commissioners, 16 Pet. 435, it was decided that the income from an official position could not be taxed if the office itself was exempt.

In Railroad Company v. Jackson, 7 Wall. 262, it was decided that a tax upon the interest payable on bonds was a tax not upon the debtor, but upon the security.

In Cook v. Pennsylvania, 97 U. S. 566, it was decided that a tax upon the amount of sales of goods made by an auctioneer was a tax upon the goods sold.

In Steamship Co. v. Pennsylvania, 122 U. S. 326, and Leloup v. Mobile, 127 U. S. 640, it was held that a tax on income received from interstate commerce was a tax upon the commerce itself and, therefore, unauthorized.

We have cited these cases to show that the law looks to the substance and not to the shadow; that a receipt, apart from the property described therein, is not taxable as property, and that the effort to give this whisky a double situs—one actually in Germany and the other

constructively in Kentucky—and to tax it in both jurisdictions, is unwarranted and can not be upheld either by reason or authority. It is violative of the fundamental law of the country.

We ask that the judgment of the Court of Appeals of Kentucky be reversed.

Respectfully submitted,

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No. 115.

Supreme Court of the United States

OCTOBER TERM, 1908.

Office Supreme Court, U. S.
FILED.
MAR 16 1909
JAMES H. McKENNEY,
CLERK.

Max Selliger, ... *Plaintiff in Error,*

VERSUS

Commonwealth of Kentucky, by
George H. Alexander,
Revenue Agent, ... *Defendant in Error.*

IN ERROR TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY.

BRIEF FOR DEFENDANT IN ERROR.

M. J. HOLT,
For Defendant in Error.

B. F. WASHER,
Of Counsel.

JOHN P. MORTON & COMPANY, INCORPORATED, LOUISVILLE.

Supreme Court of the United States

OCTOBER TERM, 1908.

MAX SELLIGER.....*Plaintiff in Error,*

versus

In Error to the Court of Appeals of the Commonwealth of Kentucky.

COMMONWEALTH OF KENTUCKY, BY GEORGE H. ALEXANDER, REVENUE AGENT.....*Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

The plaintiff in error, Max Selliger, is a resident of Louisville, Jefferson County, Kentucky. The question involved is whether the State of Kentucky can levy an ad valorem tax on 7,000 barrels of whisky belonging to him, stored in public warehouses in Bremen and Hamburg, Germany, or on the warehouse receipts for same held by him, and which are negotiable instruments and not mere evidences of title.

There is no question as to residence, no issue as to ownership, and no controversy as to the actual situs of the whisky.

Moore & Selliger, during 1891, 1892, and 1893 (tight money years) exported eighteen thousand barrels of whisky to Bremen and Hamburg. The cost of exportation was $2.50 per barrel (p. 27). If it had not been exported, as the bonded period had expired, it would have been necessary to pay the revenue tax of ninety cents per gallon (p. 24), amounting to $36 per barrel, or a total of $648,000.00, a sum hard to raise at the time. This was the sole cause of exportation. There was no demand in Germany or elsewhere for the product. It all remained in the State the full bonded period (p. 22) and was exported, as Selliger declared, because "it was more profitable to send it abroad than to tax-pay it and keep it here."

The testimony shows that the exportation was temporary; the purpose to save paying an immense sum. There was no market demand in Germany, and it was sold by the warehouse receipt and reimported to Kentucky as demanded by the trade.

Such a temporary location in a foreign warehouse is not within the rule of location and employment that exempted the cars of the Union Refrigerator Transit Company from assessment by Kentucky.

It is insisted by the defendant in error:

FIRST.

If these 7,000 barrels of whisky were exported temporarily, that is, to await a better market and reimport when the price justified, or to evade for the time being the revenue tax of ninety cents per gallon, or had not become incorporated with the general mass of property in Germany, the taxable situs is in Kentucky, the place of residence of the owner.

SECOND.

The provision of the Federal Constitution, Article 1, Section 10, Subsection 2, "that no State shall lay an IMPOST or DUTIES on IMPORTS or EXPORTS," does not apply to the levy of an ad valorem tax on this whisky or the warehouse receipts as the property of plantiff in error, because:

(a) It is a tax levied upon the personal property of all citizens of this State, wherever situated.

(b) This is not an impost or duty.

(c) The whisky has lost the character of an export; the original shipment has been broken; four fifths of it have been sold; the consignor and the consignee are one and the same, and the residue is on the market and for sale.

THIRD.

If the whisky, by reason of its exportation and actual situs in Germany, is exempt from a State ad valorem tax, then the warehouse receipts are taxable.

Whisky warehouse receipts are intangible property, the situs of which is at the domicile of the owner. They are property in and of themselves, and are not mere indicia of title. By the common and civil law, by the law merchant, and by express statutory provision (Ky. Stats., Section 4770), they are negotiable instruments.

FOURTH.

No Federal question is involved. The judgment appealed from merely decides that *whisky warehouse receipts* are intangible personal property having a taxable situs at the owner's domicile.

ARGUMENT.

I am forced to disagree with that portion of the opinion of the State court which decides that the situs of the whisky for taxation is in Germany, and that the motive of the exporter could never safely be inquired into. There is but one reason why tangible personal property in a foreign jurisdiction belonging to a resident of the State of Kentucky can not be assessed by Kentucky for ad valorem taxes, and that is because it is permanently located in another jurisdiction and employed or used there as similar local property.

The motive for exportation can be inquired into to fix the taxable situs. If exported for sale, or to be permanently used and employed within the foreign jurisdiction, and is so used, then the whisky is not taxable by Kentucky. If temporarily exported for storage or to avoid some obligation, or to save money, with the idea of returning the property when it is expedient, the courts will look behind the transaction and treat the property as still within the jurisdiction of the State from which exported. (As to motive, see Turpin v. Burgis, 117 U. S. 507.)

Unless the whisky is exempted by Article 1, Section 10, Subsection 2 of the Federal Constitution as an export, or can not be taxed as being in violation of

the "due process of law" clause of the Constitution, "because permanently located in another State and employed there," it should be assessed as omitted property by this State, because plaintiff in error is a resident of Kentucky.

The same law, the same reason, that would exempt an import from an ad valorem tax would subject an export to such tax; to be an export it must not yet have become permanently located and in use, nor a part of the mass of property of the foreign State.

The Kentucky Constitution, Section 172, and Ky. Stats., Section 4020, provide:

> "All personal estate of persons residing in this State, whether the property be in or out of this State, shall be assessed at its fair cash value."

The Court of Appeals of Kentucky, in Commonwealth v. Union Refrigerator Transit Company, reversed by this court (199 U. S. 194), declared, under a strict construction of these provisions of the Constitution and statute, that all personal estate of persons residing in this State shall be assessed by this State. The rule adopted by this court, not only in the Union Refrigerator Transit Company case but in many others, is "that tangible personal property PERMANENTLY LOCATED in another State and EMPLOYED THERE" acquires a taxable situs distinct

from the residence of the owner. The location and employment in the other State fix the situs for taxation.

In no sense was this whisky permanently located in Germany. It was not the intention of Selliger when he exported it to have it remain there, but to reimport it to the State of Kentucky when market conditions might justify such importation. It seems absurd to contend that whisky in a warehouse, placed there merely for the purpose of awaiting a better market, and for the time to evade the payment of the revenue tax, can be considered as in USE at its PLACE OF LOCATION. This court's decision emphasizes the grounds of reversal as being upon the issue of location and employment in another State, and no other is given for reversal in the Union Refrigerator Transit Company case and similar cases.

Plaintiff in error, Selliger, in his testimony says:

"51. How long had this whisky been in bounded warehouses in this State prior to its exportation?

"A. Three years.

"52. In the case of all this whisky you let it remain practically the full time that you could under the law, did you not?

"A. The bonded period.

"53. The bonded period at that time was three years, was it not?

"A. Yes, sir.

"54. During these years of 1891, 1892, and 1893 there was an immense over-production of whisky, was there not?

"A. I think there was.

"55. And wasn't that one of the prime reasons for exporting this whisky at that time?

"A. Yes, sir; we thought it more profitable to send it over there than tax-pay it here.

"60. Well, your purpose for shipping it over was to evade paying the ninety cents on the gallon, wasn't it?

"A. No, sir.

"61. What was the purpose in shipping this over?

"A. If we could have raised the money to pay the tax on it, it would have been more profitable. We sent it over there and stored it in Europe—we thought we could sell it to better advantage later on.

"80. Can you tell me what portion of this whisky that you exported to Germany was sold in Germany, and what portion brought back to the United States by you or by any person to whom you sold it?

"A. No, I could not tell you that.

"81. Can't you give some estimate as to that?

"A. Well, I would say possibly one third was brought back by us.

"82. And the balance was sold?

"A. Sold here and over there.

"83. Sold here and over there?

"A. Yes, sir; on the warehouse receipts export gauge."

An extract from the deposition of Nathan M. Uri, a wholesale liquor dealer and distiller for thirty-two years, discloses:

"5. And what was the price for whiskies in this State about that time?

"A. 1893 and 1894 they were sold nearly below the cost of production.

"6. And what was the cause of this cheap price?

"A. Over-production.

"8. Don't you know it to be the fact that about the year 1893 an immense amount of whisky was exported from this country?

"A. Well, I can't state the exact year, but I know a great deal was exported from the United States to Bermuda, Germany, France, etc.

"9. What was the purpose of that exportation at that time?

"A. Well, my opinion was that the tax on whisky was about forty dollars a barrel, thirty-six or forty dollars a barrel, and by exporting it the distiller or whoever was the owner of it would save paying the Government that thirty-six or forty dollars a barrel and save the interest on it by taking it to some foreign country; they would leave it there as long as they desired without paying the United States Government any tax."

To the same effect is the deposition of Maj. W. H. Thomas, for thirty-five years a wholesale liquor dealer in Louisville:

"12. About 1893, isn't it a fact that there was a vast over-production of whisky, and whisky was very cheap here by reason of that over-production?

"A. Yes, sir.

"13. About that time a considerable quantity of whisky was exported from Kentucky to Germany, was there not?

"A. Oh, a world of it.

"14. How much, in your judgment, was exported about that time?

"A. When I was exporting?

"15. Yes.

"A. Somewhere between two hundred and fifty and three hundred thousand barrels.

"16. What was the purpose of that exportation to Germany at that tine; was there any demand for it in Germany at that time?

"A. There was no demand for it, practically no demand for it in Germany.

"17. Well, why was it exported?

"A. In my opinion a great many like myself believed by exporting it that the time would come that if it was not bought in Europe by some people that would introduce American whiskies over there, it cost less to keep it there than it did here, that we could bring it back to this country if we could not find buyers for it in Europe, and bring it back here, and that they had good storage and it would improve there, it would be in good condition and it would bring a good price and help us out. Other men were rich, those that had plenty of credit and plenty of money, looked at it in a business way and said they could keep it cheaper in Europe than they could here; if they could not sell it in Europe then they could bring it back here and sell it here. Others just concluded that there was so much of it made, that the State had so largely over-produced, that maybe the price would never get any better."

This court, in the Union Refrigerator Transit Company case (199 U. S. 194), uses the following pertinent language:

"In that case the question is directly presented whether a corporation organized under the laws of Kentucky is subject to taxation upon its tangible personal property permanently located in other States and employed there in the prosecution of its business. Such taxation is charged to be a violation of the due process of law clause of the Fourteenth Amendment. . . . . The arguments in favor of the taxation of intangible property at the domicile of the owner have no application to tangible property. The fact that such property is visible, easily found, and difficult to conceal, and the tax readily collectible, is so cogent an argument for its taxation at its situs, that of late there is a general consensus of opinion

that it is taxable in the State where it is permanently located and employed, and where it receives its entire protection, irrespective of the domicile of the owner. . . . . In Com. v. American Dredging Co., 122 Pa. 386, 1 L. R. A. 237, 2 Inters. Com. Rep. 221, 9 A. St. Rep. 116, 15 Atl. 443, it was held that a Pennsylvania corporation was taxable in respect to certain dredges and other similar vessels which were built, but not permanently retained, outside of the State. It was said that the non-taxability of tangible personal property located permanently outside of the State was not because of the technical principle that the situs of personal property is where the domicile of the owner is found. This rule is, doubtless, true as to intangible property, such as bonds, mortgages, and other evidences of debt. . . . . In such cases it is taxable within the jurisdiction where found, and is exempt at the domicile of the owner. The property in that case, however, was held not to be permanently outside of the State, and therefore not exempt from taxation. The rule, however, seems to be well settled in Pennsylvania that so much of the tangible property of a corporation as is situated in another State, and there employed in its corporate business, is not taxable in Pennsylvania."

The case of Delaware, L. & W. R. R. Co. v. Pennsylvania, 198 U. S. 353, did not involve directly the question of the right to tax tangible property by reason of its situs in another State. The issue was the right to assess, as a portion of the capital stock of the railroad company, coal in the State of New York, sent there for sale to meet a market demand, and not to be stored as this whisky. In that case this court said:

"In the case at bar the coal had been transported to and was actually resting in another State for sale when the appraisement was made, and under the foregoing cases it was then intermingled with property in the foreign State where it rested and was at that time liable to taxation. . . . . However temporary the stay of the coal might be in the particular foreign State where it was resting at the time of the appraisement, it was *definitely* and *forever* beyond the jurisdiction of Pennsylvania, and it was in the jurisdiction of the foreign State for purposes of taxation and in truth it was there taxed. . . . . The question now discussed is simply whether under this statute of the State property of the corporation is in substance and effect taxed while it is beyond the jurisdiction of the State and is never to return."

THIS WHISKY IS NOT AN EXPORT.

The provision of the Federal Constitution, Art. 1, Sec. 10, Subsec. 2, "that no State shall lay any imposts or duties on imports or exports," does not apply to the levy of an ad valorem tax on this whisky as property of the defendant, because the tax is not an impost or duty.

This is not an export. It was shipped in 1891, 1892, and 1893. This action involves the tax years 1900 to 1905 inclusive. Adopting the contention of Selliger, even if at one time an export, it has lost that character at its destination. The original shipment is broken, two thirds of it have been sold, and the residue is on the market for sale. The consignor and the consignee are one and the same. It is not in the original package within

the meaning of the decisions, although it is in the same barrels. (Sellinger was and is a wholesale liquor dealer, and sells only by barrel quantities.)

It is said, in the case of Swan v. Finch, 190 U. S. 145:

> "As the legal notion of emigrating is a going abroad with an intention of not returning, as that of exportation is a severance of goods from the mass of things belonging to this country with an intention of uniting them to the mass of things belonging to some foreign country."

The tax sought to be imposed is not a tax imposed by Kentucky upon the whisky as a foreign product, nor a tax imposed by reason of the whisky being exported, nor a tax while it is in a state of transit to some other place of destination. It is sought to be imposed upon the whisky after its exportation and after it has reached its storage destination, and (as Selliger contends) has become property in the market at its place of destination. It therefore enjoys no discriminating favors other than all tangible property of persons in this State situated beyond the limits of this State. It is said in the case of Coe v. Errol, 116 United States, 527:

> "But if such goods are not taxed as exports, nor by reason of their exportation, or intended exportation, but are taxed as part of the general mass of property in the State, at the regular period of assessment for such property and in the usual manner, they not being in course of transportation at the time, is there any valid reason why they should not be taxed? . . . . . .

> If assessed in an exceptional time or manner, because of their anticipated departure, they might well be considered as taxed by reason of their exportation or intended exportation; but if assessed in the usual way, when not under motion or shipment, we do not see why the assessment may not be valid and binding."

Again, in the latter case and quoted in Turpin v. Burgess, 117 U. S. 507:

> "The prohibition has reference to the imposition of duties on goods by reason or because of their exportation or intended exportation or whilst they are being exported. That would be laying a tax or duty on exports or on articles exported within the meaning of the Constitution. But a general tax laid on all property alike, and not levied on goods in course of exportation, nor because of their intended exportation, is not within the constitutional prohibition. How can the officers of the United States or of the State know that goods, apparently part of the general mass, and not in course of exportation, will ever be exported? Will the mere word of the owner that they are intended for exportation make them exports? This can not for a moment be contended. It would not be true, and would lead to the greatest fraud."

It is contended by counsel for plaintiff in error that Kentucky is attempting to tax an export.

Reverse the situation. Had this been an import and in a warehouse in Kentucky, it could not have been taxed by that State.

Indulge the presumption of law that Germany does not tax an import as long as it is in a public storage warehouse, the whisky escapes taxation.

To be an export or import, within the meaning of the Constitution, the property must *not* have been offered for sale, it must *not* have become incorporated into the mass of property of the State seeking to tax it. If this whisky was yet an import in Germany, Kentucky could still impose an ad valorem tax, because it was neither in permanent use nor employed, nor had it become mixed with the general mass of property in that sovereignty. It was merely stored in a foreign jurisdiction.

It is taxable by Kentucky because it has not acquired a permanent situs in Germany. If it has, it certainly is no longer an export. Kentucky does not seek to tax it as an export, but because it has not acquired a situs elsewhere.

Had this whisky been placed in an Ohio warehouse under exactly similiar conditions, that State could not have taxed it, because it would have been an import so far as that State was concerned, not having become incorporated with and a part of the other property of that State. If the State of Kentucky could not have taxed it because an export, it would have escaped taxation. But the State of Kentucky seeks to tax it, not as an export, but because it is the property of one of her citizens, with its taxable situs at his domicile because neither permanently located in another sovereignty nor in use at its place of location, but temporarily stored there to avoid different market conditions, when it will be reimported.

Such property merely stored in a warehouse is an import which adds nothing to the taxable wealth of the country where stored, because not taxable.

In the case of Low v. Austin, 13 Wallace, 29, it is said:

> "While remaining the property of the importer in his warehouse in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."

The payment of duties imposed by the United States on imports gives the importer the right to bring his goods into this country for sale, but he does not, simply by paying the duties, escape taxation upon such goods as property after they have reached their destination for use or trade, and the box, case, or bale containing them has been opened and the goods exposed for sale. (May v. New Orleans, 178 U. S. 504.)

The cases of Brown v. Maryland, Almy v. California, and Low v. Austin are not applicable to any issue in this case.

In the case of May v. New Orleans, 178 U. S. 507, this court said the case of Brown v. Maryland establishes the following propositions:

> "1. That the payment of duties to the United States gives the right to sell the thing imported, and that such right to sell can not be forbidden or impaired by a State.
>
> "2. That a tax upon the thing imported during the time it retains its character as an import and remains the

property of the importer, 'in his warehouse, in the original form or package in which it was imported,' is a duty on imports within the meaning of the Constitution; and

"3. That a State can not, in the form of a license or otherwise, tax the right of the importer to sell, but when the importer has so acted upon the goods imported that they have been incorporated or mixed with the general mass of property in the State, such goods have then lost their distinctive character as imports, and have become from that time subject to State taxation, not because they are the products of other countries, but because they are property within the State in like condition with other property that should contribute, in the way of taxation, to the support of the Government which protects the owner in his person and estate."

As said in the case of May v. New Orleans (178 U. S. 509), changing the language only to fit exports instead of imports: "The tax here in question was not in any sense a tax on (exports) nor a tax for the privilege of (taking) the things (exported out of) the State. It was not a tax on the plaintiff's goods because they were (exported into) another country, but because at the time of the assesment they were in the market for sale in separate parcels (Selliger, as shown in the testimony, sold only by the barrel, or rather the warehouse receipt), and therefore subject to be taxed like property" belonging to citizens of the State of Kentucky.

WAREHOUSE RECEIPTS.

Are they Taxable—if so, their Taxable Situs?

The Kentucky Constitution declares: "All property owned by persons in this State shall be taxed." If a warehouse receipt is property, it is intangible property, its situs is at the domicile of the owner, and it is subject to taxation by the State of Kentucky. If the receipt is mere evidence of title, and is to be treated as a deed, to tax the warehouse receipt is in effect to tax the whisky.

I submit, as a proposition of law, borne out by the authorities of this and other States, that if this whisky, by reason of the provision of the Federal Constitution, is exempt as an export from a State ad valorem tax, or if this whisky, by reason of its situs, is exempt from such tax, then the State of Kentucky is justified in taxing the warehouse receipts as the intangible property of the appellee. They are as much property as a note or any chose in action. The whisky was sold from the State of Kentucky by Selliger, by the warehouse receipt, and the only way a sale could be made was by an endorsement and delivery of the warehouse receipt.

Counsel for plaintiff in error admit in their brief that the laws governing commercial transactions are practically uniform throughout the civilized world. The civil law, the law merchant, the common law as modified by statute, with practical unanimity make all paper in gen-

eral use in commercial transactions and transferable by delivery, negotiable. Our Statutes, Section 4770, make warehouse receipts negotiable. I know that by express statute and decisions they are negotiable in England, Alabama, Arkansas, California, Colorado, Connecticut, Georgia, Illinois, Indiana, Kentucky, Massachusetts, Mississippi, Missouri, New York, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Vermont, Virginia, and Wisconsin (Am. & Eng. Ency. of Law, page 71). All negotiable instruments are property. All have a taxable situs, which is the domicile of the owner unless otherwise expressly declared.

It is to be noted that all the while this whisky was in Germany plaintiff in error held the warehouse receipts for same. When he sold a barrel it was by delivery of the warehouse receipt. It gave to the holder thereof the constructive possession of the property. The warehouseman could not deliver the whisky without a surrender of the receipt (Insurance Company v. Kiger, 103 U. S. 356). When the holder of the receipt sold it, he indorsed it and became liable as an indorser thereon. These warehouses receipts received the benefit and protection of the Kentucky law. They were the subject of larceny. They could be replevied as other personal property. They were made negotiable and transferable by express statutory provision and by the law merchant, and by reason thereof Mr. Selliger re-

peatedly borrowed as much as eighty thousand dollars on the warehouse receipts which he owned, although he merely owned an equity in the whisky.

No matter if Selliger was the sole owner of the whisky and the warehouse receipts, this State, if it taxes the whisky, does not tax these receipts. If it taxes the receipts, it makes no attempt to tax the whisky. Germany may tax the whisky. Kentucky may tax either the whisky or the receipts, or possibly both. As said in the case of Whitaker v. Brooks, 90 Ky. 76:

> "His non-liability does not arise out of the fact that the property of the corporation in Ohio is taxed there. To also tax his stock here would not be double taxation, because to be such it must be twice taxed in the same jurisdiction. Each State is sovereign and independent in this respect, and one State can not, of course, exempt property from taxation in another."

Mr. Selliger, in his deposition, says:

> "45. The majority of the whisky that you brought back to this country was sold in the State of Kentucky, was it not?
>
> "A. Sold from the State of Kentucky—yes, sir.
>
> "71. This whisky, during all the time that it was in Germany, was your property, was it not?
>
> "A. Yes, sir.
>
> "73. You negotiated those warehouse receipts and borrowed money on them, did you not?
>
> "A. Some.
>
> "77. How many of those warehouse receipts did you negotiate or use as collateral?
>
> "A. I could not tell you that.

"78. The majority of them you used?

"A. I hypothecated them from time to time.

"96. When you hypothecated these warehouse receipts, what sums of money were loaned you on them by the various banks—how much per barrel on the whisky?

"A. I think we borrowed—we could not borrow over ten dollars on them at that time; I don't think you can borrow seven now.

"97. Then that whisky or the warehouse receipts as indicating the amount of barrels, permitted you to hypothecate them at a valuation of ten to seven dollars a barrel during these respective years?

"A. From seven to ten—yes, sir.

"98. Now, on September 15, 1899, how much were you able to borrow on these warehouse receipts a barrel?

"A. A good deal more than a great many were able to borrow on them.

"99. Well, how much were you able to borrow on them?

"A. Ten dollars a barrel.

"105. Mr. Selliger, as a rule these foreign warehouse receipts were held by the bank as security, were they not?

"A. Yes, sir.

"106. And when you say you could borrow more on them than other people could, that you could borrow ten dollars per barrel, you mean your credit added that much strength to them?

"A. That is what I mean to convey."

The extent to which, the subjects upon which, and the mode in which the taxing power shall be exercised are with the State except so far as it has been surrendered to the Federal Government, either expressly or by necessary implication. "The prohibitions in the Federal Constitution should be carried no further than to prevent the States from doing that which it was the

great object of the Constitution to prevent." (Burks v. Wells, 208 U. S. 22-25.)

"The taxing power of a State is one of its attributes of sovereignty" (N. P. R. R. Co. v. Peniston, 18 Wallace, 5), and "no question is more clearly a matter of local law than one arising under the tax laws. . . The determination of any questions affecting them is a matter primarily belonging to the courts of the State, and the national tribunals universally follow their rulings except in cases where it is claimed that some right protected by the Federal Constitution has been invaded." (Lewis v. Monson, 151 U. S. 549.)

This court has said "our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction." (Home Insurance Company v. New York, 134 U. S. 600.)

It is therefore immaterial if Germany taxes this whisky; under similar conditions the State of Ohio could not tax it. It is not of record that Germany taxes it. If the owner of personal property within a State resides in another State, which taxes him for that property as part of his general estate attached to his person, this action of the former State does not in the least affect the right of the State of his domicile to tax it also (Pullman Co. v. Penn., 141 U. S. 311, 306 U. S. 402, Buck v. Beach); to constitute double taxation the property must be twice taxed in the same jurisdiction.

The case reduces itself to the single question: Is the taxation of these receipts a deprivation of property *without due process of law?*

Clearly not, if a *warehouse receipt is property*, and that is the only issue which the Kentucky Court of Appeals decided.

That court decided that Kentucky could not tax whisky stored in Bremen and Hamburg, Germany; that a tax on the warehouse receipts owned by Selliger was not a duty on the whisky; and that whisky warehouse receipts are intangible property having a taxable situs at the domicile of the owner. That portion of the opinion reads:

> "We do not find the slightest evidence of a purpose on the part of the State to lay a duty on the whisky because it was exported, by imposing the tax in question. On the contrary, the tax is levied upon all personal property owned by citizens of this State, wherever situated (if subject at all to the taxing jurisdiction of the State), upon the sole theory that the situs for purposes of taxation is the domicile of the owner. . . It is safest to treat the property exported as being thereafter within the jurisdiction of the Government within whose territory it may be lodged. The whisky in the case at bar having been stored in a warehouse in Germany, where it became a part of the mass of property within the German Empire, doubtless owed a duty to pay taxes to the support of the Government while there. The State of Kentucky neither had nor should attempt to exercise further jurisdiction over it for any purpose. . . We are of opinion, and without hesitation hold, that warehouse receipts, wherever issued, and whatever they may represent, are intangible personal property, whose situs for purposes of taxation is the domicile of their owner."

That warehouse receipts are property is clear, since:

(a) The sale of the warehouse receipt gives the *jus in re.*

(b) They are transferred by endorsement and delivery.

(c) Such endorsement places the right of action in the endorsee.

(d) The endorser becomes liable, and each endorsement enhances the value.

(e) The warehouseman can not set up the defenses against the endorsee which he might against the original holder.

(f) It may be endorsed in blank and transferred by delivery only and then be lost or stolen, when a bona fide purchaser for value acquires title to it even against the true owner. The purchaser is not bound to look beyond the instrument.

(g) They are the subject of larceny; subject to levy and sale on execution; subject to seizure and delivery in a replevin suit; and the subject of conversion in trover.

(h) They float upon the markets as property as surely as bonds or notes.

(i) They have been held to be goods, wares, and merchandise, within the meaning of the statute of frauds.

(j) By the purchase of the receipt the purchaser became the owner of the whisky in constructive possession by the payment of one fifth the sum it would be

necessary to pay for an actual delivery of the whisky. As said in the case of Farmer v. Etheridge, 24 Kentucky L. R. 563:

> "Such receipts when issued by the warehousemen are negotiable at common law, and are put upon the footing of bills of exchange, with like remedies thereon by the statute. As said by this court in Cochran & Fulton v. Ripy & Hardie, etc., 76 Ky. 495:
>
> "'The act was designed to advance commercial interests of the State in affording facilities for making sale of personal property in a warehouse without actual delivery, and to enable the owner by transfer of the warehouse receipts to pledge the property for the advance of money or the payment of debts.
>
> "And there is nothing in the statute which limits their negotiable character to transactions had in this State with citizens thereof, and such a construction would be at variance with the intention of the statute.'"

(k) They are tangible things capable of delivery, continuously present in Kentucky at the domicile of their owner.

(l) The whisky is inseparable from the receipt. Its ownership follows the receipt, not the receipt the whisky. The warehouse receipt declares and constitutes the property by statute, by the law merchant and by tradition.

As said in the case of Union Trust Company v. Wilson, 198 U. S. 536:

> "The transfer of the receipt is not a symbolical delivery it is a real delivery, to the same extent as if the goods had been transported to another warehouse named by the pledgee."

When Selliger sold a receipt the purchaser became the owner of the receipt, of its equities, and the constructive possessor of the whisky immediately, although the German warehouseman might not know of such sale for years.

The Court of Appeals in its opinion, 30 Ky. L. R. 452-3, says:

> "The warehouseman in Germany, who issues warehouse receipts for the whisky, created a distinct property in the receipts. While in a sense they represented the whisky, being its symbol for certain purposes, it could scarcely be maintained, for it is not true, that they stand in lieu of the whisky for all commercial purposes. Like all symbols, they are fictions; so are promissory notes and bonds. Each is a representative or evidence of something else. Yet everywhere each has an individual value, derivative, it is true, from the thing on which it is rested, yet is deemed distinct property. A bond is an evidence of the promise of its maker to pay its face at a time ascertainable. Its original commercial value depends upon the value of the security supporting it, whether it be the solvency of its maker, his credit, or the hypothecation of collateral to insure its being redeemed. Its indorser may add to its original value as property by his solvency, and so forth. Yet as so much paper it is valueless, whether for taxation or trade. It may rest for the security of its redemption upon real estate, or for that matter whisky mortgaged, while it derives its value as a commercial asset in part—or may be in whole—from the mortgaged property securing it, it is always and everywhere deemed property of the value which it may have in the market, and may be taxed, although the property mortgaged to redeem it is beyond the taxing district, and may also be taxed where it is situated. A warehouse receipt partakes of some of the same features. Its original

value may depend entirely on the value of the chattel it represents, and which is deemed to be in pledge to redeem it. But such receipts are generally negotiable as bonds and bills of exchange are. Each indorser may add materially to their value. They float upon the markets of the world as property as surely as bonds are property. Whoever owns them owns that much of assets having such value as the market affords to them, which may be sold, hypothecated, attached for debt, and are the subject of inheritance. Like other choses in action, their situs is that of their owner. His security and comfort given to them by government enable him to hold and enjoy them."

In the case of New Orleans v. Stemple, 105 U. S. 320, it is said:

"The same doctrine was reaffirmed in Stockton v. Stangrough, 3 La. Ann. 390. Now if property can have such a situs within the State as to be subject to seizure and sale on execution, it would seem to follow that the State has power to establish a like situs within the State for purposes of taxation.

"It has also been held that a note may be made the subject of seizure and delivery in a replevin suit. Graff v. Shannon, 7 Iowa, 508; Smith v. Eals, 81 Iowa, 235; Pritchard v. Norwood, 155 Mass. 539.

"It is well settled that bank bills and municipal bonds are in such a concrete, tangible form that they are subject to taxation where found, irrespective of the domicile of the owner; are subject to levy and sale on execution, and to seizure and delivery under replevin; and yet they are but promises to pay—evidences of existing indebtedness. Notes and mortgages are of the same nature; and while they may not have come so generally recognized as tangible personal property, yet they have such a concrete form that we see no reason why a State may not declare that if found within its limits they shall be subject to taxation."

NO FEDERAL QUESTION.

No Federal question is involved, no provision of the Federal Constitution is violated by this decision, which merely declares "that warehouse receipts, *wherever* issued, and *whatever they may represent*, are *intangible* personal property whose situs for purposes of taxation is the *domicile* of their *owner*."

As early as 1844, the Kentucky Court of Appeals (4 B. M. 443, Bank U. S. v. Huth) decided:

> "In the general, personal property or debts owing have been adjudged to have no locality, but follow the person of the owner or creditor, and are assignable, transferable, or transmissible by his voluntary act, according to the laws of the country of his domicile. And this, as a general rule, is regarded by all civilized nations, and it is highly proper that it should be, otherwise the owner or creditor, being ignorant of the laws of the country of their situs, or of the residence of the debtor, might be deluded and deceived in their honest efforts to dispose of them, and innocent purchasers or assignees in their honest effort to acquire them. . . The peace and harmony among States and nations, and the mutual protection, security, and safety of the rights of the citizens of each, demand that this great law of nations should not, upon slight grounds, be impaired or disregarded."

The case of Savings Society v. Multnomah County, 169 United States 426-427-431, seems directly in point. Therein it is said:

> "The case, then, reduces itself to the question whether this tax act, as applied to mortgages owned by citizens of other States and in their possession outside of the State

of Oregon, deprives them of their property without due process of law. . . . . .

"The authority of every State to tax all property, real and personal, within its jurisdiction, is unquestionable. (McCulloch v. Maryland, 4 Wheat. 316, 429.) Personal property, as this court has declared again and again, may be taxed, either at the domicile of its owner or at the place where the property is situated, even if the owner is neither a citizen nor a resident of the State which imposes the tax. (Tappan v. Merchants Bank, 19 Wall. 490, 499; State Railroad Tax Cases, 92 U. S. 575, 607; Coe v. Errol, 116 U. S. 517, 524; Pullman Car Co. v. Pennsylvania, 141 U. S. 18, 22, 27.) The State may tax real estate mortgaged, as it may all other property within its jurisdiction, at its full value. It may do this, either by taxing the whole to the mortgagor, or by taxing to the mortgagee the interest therein represented by the mortgage, and to the mortgagor the remaining interest in the land. And it may, for the purposes of taxation, either treat the mortgage debt as personal property, to be taxed like other choses in action. . . . Although the right which the mortgage transfers in the land covered thereby is not the legal title, but only an equitable interest and by way of security for the debt, it appears to us to be clear upon principle, and in accordance with the weight of authority, that this interest, like any other interest, legal or equitable, may be taxed to its owner (whether resident or non-resident in the State where the land is situated), without contravening any provision of the Constitution of the United States."

This case is more like that of Kelly v. Rhodes, 188 U. S. 1, than any other cited by plaintiff in error.

This court is bound to give to the State court's decision that construction which is most advantageous to the interest of the State. The State Constitution and statutes assess all personal property of residents of

the State of Kentucky. The State court has declined to tax the whisky, although only temporarily located in a foreign warehouse and placed there—not for sale, but because it was *expedient* to do so.

The decision appealed from merely declares warehouse receipts to be intangible property. Wherein lies the Federal question that gives this court jurisdiction?

The established doctrine of this court is aptly expressed in the case of Kirtland v. Hotchkiss, 100 U. S. 498. Therein it is said:

> "It may, therefore, be regarded as the established doctrine of this court, that so long as the State, by its laws, prescribing the mode and subjects of taxation, does not entrench upon the legitimate authority of the Union, or violate any right recognized, or secured, by the Constitution of the United States, this court, as between the State and its citizen, can afford him no relief against State taxation, however unjust, oppressive, or onerous. . . It is, consequently, for the State to determine, consistently with its own fundamental law, whether such property owned by one of its residents shall contribute, by way of taxation, to maintain its government. Its discretion in that regard can not be supervised or controlled by any department of the Federal Government, for the reason, too obvious to require argument in its support, that such taxation violates no provision of the Federal Constitution."

Respectfully submitted.

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Of Counsel.

POINTS OF LAW.

I.

If the seven thousand barrels of whisky were exported temporarily, that is, to await a better market and to be reimported when the price justified, or to evade for the time being the revenue tax of ninety cents per gallon, the taxable situs is in Kentucky, the place of residence of the owner.

199 U. S. 194, Union Refrigerator Transit Company v. Kentucky.
111 Ky. 667, Board, etc., v. Fidelity Trust Co., etc.
178 U. S. 507, May v. New Orleans.
Kentucky Constitution, Sections 172, 174.
Kentucky Statutes, Section 4020.

II.

If the whisky, by reason of its exportation and actual situs in Germany, is exempt from a State ad valorem tax, then the warehouse receipts are taxable.

Whisky warehouse receipts are intangible property, the situs of which is at the domicile of the owner. They are property in and of themselves, and are not mere indicia of title.

By the common and civil law, by the law merchant, and by express statutory provision (Ky. Stats., Sec. 4770) they are negotiable instruments.

30 Ky. L. R. 452,453, Commonwealth v. Selliger.
Kentucky Constitution, Section 172.
Kentucky Statutes, Sections 4020, 4770.
Farmer v. Ethridge, 24 Ky. L. R. 653.
Cochran, etc., v. Ripy, 13 Bush (Ky.), 505.
Greenbaum v. Meggilen, 10 Bush (Ky.), 420.
Purdy's Beach on Private Corporations, Sections 271, 272, 509a, 350, 510.
111 Ky. 677, Board, etc., v. Fidelity Trust Co.
30 A. & E. Ency. Law, pp. 69 to 77.
52 Am. Rep. 122, Winslow v. Fletcher.
148 Pa. St. 601, Wilkesbarre, etc., v. Wilkesbarre.
90 Ky. 76, Whitaker v. Brooks.
148 N. Y. 441, Knox v. Eden.
151 U. S. 470, Columbus, etc., v. Wright.

III.

The provision of the Federal Constitution, Art. 1, Section 10, Subsection 2, "that no State shall lay an *impost* or *duties* on *imports* or *exports*," does not apply to the levy of an ad valorem tax on this whisky or the warehouse receipts as the property of plaintiff in error, because:

A. It is a tax levied upon the property of all citizens of this State, wherever situated.

B. This is not an impost or duty.

C. The whisky has lost the character of an export, the original shipment has been broken, four fifths of it have been sold, the consignor and consignee are one and the same, and the residue is on the market and for sale.

178 U. S. 501, 509 (import case), May v. New Orleans.
116 U. S. 517 (export case), Coe v. Errol.
117 U. S. 506, 507 (export case), Turpin v. Burgess.
114 U. S. 519, 510, American Steel Co. v. Speed.

IV.

No Federal question is involved.

McCullough v. Maryland, 4 Wheaton, 316–418, 428, 429.
Burke v. Wells, 208 U. S. 22–25.
Union Pacific Railway Co. v. Peniston, 18 Wallace, 5.
Lewis v. Monson, 151 U. S. 549.
Home Insurance Co. v. New York, 134 U. S. 600.
Delaware Railroad Tax Case, 18 Wall. 206-231.
Coe v. Errol, 116 U. S. 524.
Saving Society v. Multnomah County, 169 U. S. 426, 427, 431.
Kirtland v. Hotchkiss, 105 U. S. 498.
Bank U. S. v. Huth, 4 B. M. 443 (Ky.)
New Orleans v. Stempel, 105 U. S. 320.